

Case 2:20-cr-00134-RMP ECF No. 61-5 filed 09/21/21 PageID.318 Page 1 of 199

## Exhibit E

### Transcript of Evidentiary Hearing

*U.S. v. Carrillo-Lopez*, D. Nev.  
case 3:20-cr-26-MMD-WGC

February 2, 2021

1                         UNITED STATES DISTRICT COURT  
2                         DISTRICT OF NEVADA  
BEFORE THE HONORABLE MIRANDA M. DU, CHIEF DISTRICT JUDGE  
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4                   United States of :  
5                   America, : No. 3:20-cr-026-MMD-WGC  
6                         Plaintiff, : February 2, 2021  
7                         : :  
8                         -vs- :  
9                         : United States District Court  
Gustavo Carrillo-Lopez, : 400 S. Virginia Street  
                           : Reno, Nevada 89501  
                       Defendant. : .

**TRANSCRIPT OF  
EVIDENTIARY HEARING**

A P P E A R A N C E S :

FOR THE GOVERNMENT: Peter Walkingshaw  
Assist. United States Attorney

FOR THE DEFENDANT: Lauren Gorman  
Assist. Federal Public Defender

Proceedings recorded by mechanical stenography produced by computer-aided transcript

Reported by: KATHRYN M. FRENCH, RPR, CCR  
NEVADA LICENSE NO. 392  
CALIFORNIA LICENSE NO. 8536

1 Reno, Nevada, Tuesday, February 2, 2021, 9:00 a.m.

2 ---OoO---

3

4 THE COURT: Good morning.

5 Are you ready to proceed?

6 THE CLERK: This is the date and  
7 time set for evidentiary hearing in case number  
8 3:20crimina-026-MMD-WGC, United States of America  
9 versus Gustavo Carrillo-Lopez.

10 Present via video conference for the  
11 government is Peter Walkingshaw.

12 Present via video conference for the  
13 defendant is Lauren Gorman.

14 Defendant is not present. Ms. Gorman  
15 will place on the record the reasons why he is not  
16 present.

17 The Spanish interpreters, Judy Jenner and  
18 Olivia Reinshagen-Hernandez, have been released for  
19 the day.

20 THE COURT: Thank you, Miss Clerk.

21 Ms. Gorman, I understand there was an issue  
22 with the transportation of Mr. Carrillo-Lopez, and that  
23 he is waiving his appearance at this evidentiary hearing  
24 this morning.

25 Is that correct?

1 MS. GORMAN: That's correct, Your Honor.

2 I'll also note that a waiver is not even  
3 formally required under Rule 43, uh, because it's not  
4 one of those hearings where he is actually required to  
5 be present.

6 THE COURT: Even assuming that, he has a  
7 right to appear and that a waiver is required, are you  
8 representing that he is waiving his right to appear?

9 MS. GORMAN: I am, Your Honor.

10 THE COURT: All right. Thank you,  
11 Ms. Gorman.

12 And I agree, given that this is an  
13 evidentiary hearing where I'm expecting to hear expert  
14 testimony, I think that Mr. Carrillo-Lopez's appearance  
15 is not required. And assuming it is, I will accept the  
16 waiver and we'll proceed.

17 MS. GORMAN: Thank you, Your Honor.

18 And Your Honor, possibly, can I just make  
19 some sort of preliminary remarks to kind of streamline  
20 this presentation?

21 THE COURT: What preliminary remarks do you  
22 have to offer?

23 MS. GORMAN: One, I understand that there  
24 were multiple motions and supplements filed. I would  
25 just ask for the purpose of a streamlined presentation,

1 for those to be incorporated into the record, rather  
2 than admitted independently as exhibits.

3                   And then with respect to the two experts  
4 testifying, I understand that the government would  
5 like to invoke the Rule of Exclusion. While that is  
6 entirely within this Court's discretion, the Rule of  
7 Exclusion does not necessarily apply to experts; and  
8 particularly in this case, where I think it would  
9 avoid duplication of testimony. And where these are  
10 experts who generally rely upon each other and in  
11 their respective fields and draw on each other's  
12 scholarship, just in general, I don't think the Rule  
13 of Exclusion is necessary and I think it could  
14 streamline the proceeding not to have it, whereas one  
15 expert could comment on another's and, et cetera.

16                 THE COURT: Well, I would note that for  
17 purposes of the motion, counsel, you know -- both of  
18 you know -- that the Local Rules provide for a motion, a  
19 response, and a reply. And in this case, there's been  
20 multiple notices supplementing what's been filed.  
21 I've allowed it without any party requesting leave,  
22 primarily, because some of the filings, I think are --  
23 would have been allowed anyway, given the reason --  
24 the case law that's been developing. And given the  
25 importance of the issue here, I want to make sure that

1 the record is thorough, which is another reason why I  
2 haven't intervened to let you know that you shouldn't  
3 continue to keep filing notices of supplementation.

4 It's not easy for me, or my law clerk,  
5 when I am reviewing the filings and then discover, the  
6 next morning or the next evening, that there's a new  
7 supplement. I hope that this hasn't happened before I  
8 issued the order. Regardless, I'm going to accept the  
9 filings. It's part of the record. If you want to  
10 refer to the ECF number for the filing as part of the  
11 evidentiary hearing today, I don't have an issue with  
12 that.

13 With respect to the Rule of Exclusion, I'll  
14 let Mr. Walkingshaw respond as to why he believes that  
15 the Court should permit the rule to be invoked for the  
16 two expert witnesses.

17 MR. WALKINGSHAW: Thank you, Your Honor.

18 And if I can also briefly be heard on the  
19 supplementation issue as well. But to answer the  
20 Court's first question, the two experts are both going  
21 to be testifying, in large part, to historical facts.  
22 They rely on similar methods and methodologies. The  
23 purpose of the Rule of Exclusion is to avoid having one  
24 witness tailor their testimony based on what they've  
25 heard other witnesses say. While experts are sometimes

1 allowed -- or exempt from the rule of exclusion, I  
2 believe the case cited by Ms. Gorman, in correspondence  
3 with Ms. Vannozzi, refers to experts that are essential  
4 to the management of litigation, which doesn't appear  
5 to be applicable in this case. And I believe there's  
6 representation as to some ambivalence as to whether or  
7 not the rule is invoked.

8                   So for those reasons, I think this is  
9 a fairly classic instance in which I think the rules  
10 should be observed, given the historical facts that we  
11 expect to have entered into the record today.

12                  THE COURT: So is there a concern that  
13 somehow the -- I want to understand the argument that  
14 the "experts may tailor their testimony." So generally  
15 with fact witnesses, there's concern that one's  
16 recollection may be influenced by hearing what  
17 another's recollection is. But, here, the witnesses  
18 are offering their testimony as to their expertise. So,  
19 I'm trying to understand how they would tailor their  
20 testimony that would present a concern that one would  
21 normally find with fact witnesses.

22                  MR. WALKINGSHAW: Well, Your Honor, I  
23 believe that not only will the witnesses be testifying  
24 to historical facts, but also will be commenting on  
25 scholarship associated with the history of immigration.

1 I believe Mae Ngai is cited by both of them fairly  
2 extensively. And to the extent that those discussions,  
3 either on direct or on cross, you know, may influence  
4 the way that that scholarship is framed or presented, I  
5 really think that the expert should be testifying from  
6 their own expertise, as opposed to what they've heard in  
7 prior testimony.

8 THE COURT: All right.

9 I'm going do deny the government's request  
10 to invoke the Rule of Exclusion. This is an evidentiary  
11 hearing. The evidentiary rules are more relaxed. In  
12 addition, I'm hearing testimony from expert witnesses  
13 who I would expect to testify and present their own  
14 expertise. So to the extent that they their testimony  
15 reveals that they're influenced by each other's  
16 testimony, I will take that into account and consider  
17 the weight of the testimony. But in terms of concern  
18 that they may be somehow tailoring their testimony  
19 and adopting each other's testimony, I don't think  
20 that's a concern here, at least as -- based on just my  
21 general understanding as to how experts present their  
22 testimony. For those reasons, I'm going to deny the  
23 request.

24 And so if the other expert is in the waiting  
25 room and wants to sign into the video conference, he

1 may do so.

2 THE CLERK: Your Honor, I'm admitting them  
3 into the main conference right now.

4 THE COURT: And Mr. Walkingshaw, you wanted  
5 to be heard on the issue of supplementation.

6 MR. WALKINGSHAW: Thank you, Your Honor.

7 THE COURT: Is there something else you want  
8 to add other than what you indicated in the response  
9 that's filed as -- which is the last document filed as  
10 ECF 46?

11 MR. WALKINGSHAW: Yes, Your Honor.

12 I do believe, in terms of the notices  
13 filed, there is fairly substantial substantive  
14 difference. The notice that I filed on Thursday was  
15 case law that's developed since briefing ended. And  
16 appears based on the two notices filed on Friday,  
17 that the defendant is coming to the hearing with a  
18 substantially different theory of an equal protection  
19 claim than what was fairly presented in the briefs.

20 The briefs refer, entirely, to a failure  
21 to reckon with the 1929 law. It appears, now, that a  
22 theory is being put forward that the 1952 law was  
23 independently motivated by racial animus. Your Honor,  
24 I would ask for post-hearing briefing hearing on that  
25 issue, to the extent the Court is going to consider it.

1 I believe the Court's comments were entirely correct  
2 that the record here should be fulsome so the Court  
3 should be given as much opportunity as possible to fully  
4 deliberate on the issues. I think post-hearing briefing  
5 would properly frame and present them.

6 I'll also note that the pretrial motion  
7 deadline has been extended until June of this year.  
8 Trial is not until August. So I think in order to,  
9 you know, promote a fulsome record, I think post-hearing  
10 briefing is really the appropriate course in this  
11 case.

12 MS. GORMAN: Your Honor, may I respond?

13 THE COURT: Yes.

14 MS. GORMAN: Your Honor, to be very  
15 clear, my position is that the legislative body that  
16 deliberated about this law is the legislator whose  
17 intent matters. But based on the government's response,  
18 and particularly based on the supplementation in  
19 addition, sort of calling the Court's attention that  
20 the judges who have ruled on 1326, specifically have  
21 done two things: Both refused to allow having an  
22 evidentiary hearing which witnesses could testify on,  
23 and then rely upon the codification of this law in 1952,  
24 without allowing evidence that there's no evidence of  
25 animus. So, I think this record should be as complete

1 as possible.

2 It's not a deviation from the original  
3 position. But in the event that this court finds  
4 that the legislative intent regarding, particularly,  
5 1952 is relevant -- which is the government's,  
6 essentially, exclusive position, is that the Court  
7 should not rely on 1929 when eugenics was, I think,  
8 undisputedly a motivating factor in the passage of  
9 illegal re-entry, then, you know, testimony regarding  
10 1952 is certainly appropriate.

11 And going forward, I just want to be  
12 very clear that this law was passed in 1929. It was  
13 recodified in 1952. And subsequently, there's been  
14 various amendments. So I don't think the amendments,  
15 necessarily, have the legislative intent regarding these  
16 amendments, and I don't think are necessarily legally  
17 relevant. But, I do think what's very important is for  
18 this court to have a full a record as possible, going  
19 from the events leading up to 1929, up until the last  
20 amendment, though our original position remains the  
21 same. And if this court intends to rely on 1952, it  
22 should have an evidentiary record and history to support  
23 that, and that has, historically, been the government's  
24 position, that we should just ignore 1929, even though  
25 the law has been in continual effect since 1929. And

1 so I guess -- I have no opposition to post-hearing  
2 briefing if the Court should find it appropriate,  
3 but these supplements, and particularly testimony  
4 regarding 1952, and even beyond, are in response to  
5 the government's position that that is sort of the  
6 relevant legislative context.

7 THE COURT: But, to be fair, the government  
8 took that position in its response to the initial motion  
9 and you did not offer these additional supplementations  
10 in the reply. It was after briefing closed and after  
11 the last hearing that the supplementations were filed.

12 Is that correct?

13 MS. GORMAN: I mean --

14 THE COURT: So, in other words, the  
15 government's position has not been a mystery. It  
16 stated its position in its response to the motion,  
17 that the Court should focus on the 1952 codification.

18 MS. GORMAN: So we intend to present  
19 evidence that both addresses the government's  
20 position, which I think is perfectly permissible in  
21 any litigation, but, particularly --

22 THE COURT: But Mr. Walkingshaw's point  
23 is that you didn't do that in the reply brief. That  
24 was the opportunity to respond to the government's  
25 position, in the reply brief. Instead, you waited

1 until after briefing closed, after the hearing, to  
2 provide these additional supplemental authorities.  
3 That's his point.

4 MS. GORMAN: Yes, Your Honor. And I, as  
5 I said before, our original position is the same; that  
6 it's the legislative body that initially deliberated  
7 about and then passed this law, that is the legislator  
8 that matters.

9 The government's supplements, in  
10 particular, call attention to cases where the Court  
11 says, okay, Arlington Heights applies, but you've  
12 shown no legislative animus with regard to 1952,  
13 so we're going to deny on that basis. Hence, the  
14 supplementation. So it's not a concession that  
15 1952's legislative intent is the legislative intent  
16 that matters, but I do think for the Court to consider,  
17 fairly, the government's position, and our position,  
18 the Court should have as full an evidentiary record  
19 as possible.

20 So while we're not conceding that point,  
21 these are a historian and a political scientist who  
22 are both eminent scholars that can speak to the  
23 government's position as well as the defense's position.  
24 And I think -- we are not afraid of this legislative  
25 history or this historical context, and the Court can,

1       essentially, use the expertise to evaluate the  
2 government's position and the defense's position. And  
3 whichever way the Court rules, I think that these  
4 experts -- in particular Professor Lytle Hernandez,  
5 is going to focus on the events leading up to 1929.  
6 Professor Gonzalez O'Brien can speak to that, but also,  
7 sort of, his expertise is more contemporary as well,  
8 and I think the Court should have as complete a record  
9 as possible.

10                 THE COURT: Ms. Gorman, that's the reason  
11 why I granted the evidentiary hearing request. I  
12 just made an observation that the government stated  
13 its position in its response, not just in the  
14 supplementation that was filed, and so I believe --  
15 and I find that Mr. Walkingshaw's point is a fair  
16 one; and that is, that defendant did not offer these  
17 additional authorities in its reply brief. It's only  
18 after briefing closed, and after the hearing, that these  
19 additional authorities were offered -- this additional  
20 evidence of the legislative history from the 1952  
21 codification was offered.

22                 I'm just making a note that I agree with  
23 him, and so I'm going to grant -- because -- well, I  
24 start with the premise that the issue is important  
25 enough, but I want the parties to have the full

1 opportunity to present briefing and any expert  
2 testimony. So to the extent that the government  
3 requests additional briefing after the hearing, I'm  
4 going to grant it because, as I said, I find the  
5 defendant could have offered these additional  
6 authorities in the reply brief, in response to the  
7 government's position in its response brief.

8 I would have to say that I'm not going to  
9 take any additional evidence after today's hearing.  
10 The post-hearing brief will be for you to present legal  
11 arguments so that -- I do need to close the briefing  
12 period so I can decide the motion, which has to be  
13 decided at some point. I'm not going to keep leaving  
14 the briefing period open.

15 With that, I'll hear from the expert  
16 testimony.

17 MR. WALKINGSHAW: Your Honor --

18 MS. GORMAN: And Your Honor, just to --  
19 okay. Pardon me.

20 Just to be clear, you know, some of  
21 the expert testimony, particularly Professor Gonzalez  
22 O'Brien, I think then should particularly speak to 1952,  
23 et cetera, and there's, obviously, been no opposition  
24 to the scope of his testimony and it was filed with the  
25 Court.

1                   THE COURT: I'm going to permit it.

2                   Mr. Walkingshaw, what's your point?

3                   MR. WALKINGSHAW: Your Honor, just before  
4 testimony gets underway, I do want to make sure that  
5 the government's position is clear -- and there was a  
6 bit of an exchange between the Court and Ms. Gorman.

7                   The government's position is not that 1952  
8 is the exclusive determination that the Court should  
9 consider. The government's position is that the, the  
10 history of this law begins with 1952, but it continues  
11 through the amended versions that were subsequently  
12 passed.

13                  I bring this only up so that there's no  
14 confusion when the experts present testimony, such  
15 that -- I just don't -- I believe this is more than  
16 fairly presented in our briefs, but I don't want there  
17 to be any claim of unfair surprise as to what our  
18 position actually is. Ms. Gorman said that she believes  
19 that the amendments are not legally relevant. We don't  
20 agree. We think they are. So I just thought I would  
21 put that on the record before testimony commences.

22                  THE COURT: At the last hearing, the  
23 government conceded that the passage of the 1929  
24 law was made -- motivated, was motivated by racial  
25 animus, at least to satisfy the Arlington Hill (sic.)

1 factors, is that right -- Arlington Heights factors.

2 MR. WALKINGSHAW: The Arlington Heights.

3 Motivated in part-

4 THE COURT: Arlington Heights. I say  
5 Arlington Heights in my mind so often, I only think of  
6 Arlington. But, Arlington Heights.

7 MR. WALKINGSHAW: Yes, Your Honor.

8 But as the Court may recall, the government  
9 also put forth the position that Congress gets a clean  
10 slate when it passes new legislation or recodifies or  
11 re-adopts legislation in the absence of racial animus.

12 THE COURT: And given the government's  
13 concession, I had initially thought that an evidentiary  
14 hearing was not required. But after hearing additional  
15 arguments, I granted Ms. Gorman's request to offer  
16 testimony to provide context.

17 And so with that, Ms. Gorman, I don't  
18 think that the experts need to necessarily focus too  
19 many details on the legislative history in 1929, except  
20 to the extent that -- I know what you're trying to do.  
21 You're trying to present this additional testimony to  
22 show that there should not be a -- that that history  
23 and that environment permeated and led to the 1952  
24 codification, and Congress should not be able to just  
25 distance itself from the prior history. I know that's

1 the defendant's position. Nevertheless, I don't think  
2 that the experts needs to spend an exhaustive amount  
3 of their testimony relating to the history in 1929.  
4 But, I'll give you enough leave to present testimony.

5 MS. GORMAN: Thank you, Your Honor.

6 We expect Professor Lytle Hernandez's  
7 testimony to be briefer, particularly in light of that  
8 previous concession. But, thank you, Your Honor.

9 THE COURT: All right.

10 Let's proceed then.

11 THE CLERK: Will the witness, Professor  
12 Lytle Hernandez -- thank you very much.

13  
14                   **KELLY LYITLE HERNANDEZ,**  
15                   called as a witness on behalf of the Defendant,  
16                   was sworn and testified as follows:

17 THE CLERK: Please state for the record your  
18 full name and spell your last name.

19 THE WITNESS: Kelly Lytle Hernandez.

20 It's two last names: L-y-t, as in Tom, l-e.  
21 H-e-r-n-a-n-d-e-z.

22 THE COURT: And please spell your first name  
23 as well.

24 THE WITNESS: K-e-l-l-y.

25 THE CLERK: Thank you.

MS. GORMAN: May I proceed, Your Honor?

1                   THE COURT: Yes.

2                   **DIRECT EXAMINATION**

3 BY MS. GORMAN:

4       Q. Thank you for coming, Professor Hernandez.

5               And I want to just jump right in by talking  
6 about your expertise and your qualifications by  
7 training. So can you please describe your knowledge,  
8 training, and education, and as it relates to the  
9 history of the criminalization of immigration  
10 enforcement in particular.

11      A. Sure.

12           Well, I have my Ph.D in U.S. History from UCLA,  
13 with, really, areas of specialization in policing and  
14 immigration. And I've written two books on this  
15 subject: Migra!::, A History of the U.S. Border Patrol,  
16 which is focused on the story of how the U.S. Border  
17 Patrol became the focus on the -- Mexican -- U.S.  
18 southern border. That was published by the University  
19 of --

20           (Zoom audio interruption.)

21           THE CLERK: Professor Hernandez, you are  
22 cutting in and out. Please make sure you're close to  
23 your microphone.

24           THE COURT: And it seems like you trail at  
25 the end of your sentences, so -- I don't know if it's

1 because of the mic or because you are not sitting as  
2 close to the mic.

3 THE WITNESS: I'll move closer.

4 Does that help?

5 MS. GORMAN: Yes. We'll try it.

6 THE WITNESS: Should I resume?

7 THE COURT: Yes.

8 THE WITNESS: Okay.

9 So, Migra was published by University of  
10 California Press, an academic peer review press.

11 My second book, City of Inmates: Conquest,  
12 Rebellion, and the Rise of Human Caging in Los Angeles,  
13 is the book that really has a chapter that focuses on  
14 the criminalization of unlawful entry and re-entry into  
15 the United States. That, too, was published by a peer  
16 reviewed academic press, University of North Carolina.  
17 And it won multiple prizes, which is you can think of  
18 that as another form of peer review.

19 BY MS. GORMAN:

20 Q. So, and to be specific, you hold an endowed chair  
21 currently at UCLA, is that correct?

22 A. Sure. I hold the Tom Lifka Endowed Chair in  
23 history at UCLA. I was also awarded a MacArthur Genius  
24 Fellowship for my historical and contemporary work.  
25 And I sit on the Pulitzer Prize Board as the historian.

1 Q. Thank you, Professor Hernandez.

2 And Professor Hernandez, I know this is probably  
3 an obvious question, but are you familiar with the  
4 Declaration that was drafted in connection with this  
5 case by you?

6 A. Yes. That Declaration is based on my work from  
7 Migra and City of Inmates.

8 Q. And can you, additionally, and to the best of  
9 your knowledge, is everything that you presented in  
10 that Declaration true and correct, to the best of your  
11 knowledge?

12 A. To the best of my knowledge, yes.

13 Q. And in terms of additional, sort of, credentials,  
14 do you attend any academic conferences, present  
15 comments, chair panels, and -- in the department of  
16 history or regarding immigration law enforcement?

17 A. Sure. I'm quite active in the scholarly circles  
18 around immigration, so I attend the Western Historical  
19 Association meeting regularly, the Organization of  
20 American Historians' annual meeting regularly. I'm an  
21 elected member of the Society of American Historians.  
22 I've been a member of the Immigration and Ethnic History  
23 Society. I regularly present at universities across the  
24 country on this topic and subject, and regularly engage  
25 with my colleagues across the country, and in Mexico

1 and around the world, on immigration and policing.

2 Q. Thank you, Professor Lytle Hernandez.

3 And then just sort of briefly -- I will focus  
4 your testimony on the events leading up to 1929 -- but  
5 can you explain to the Court your understanding how  
6 the 1929 Act is connected to the Section 1326 offense  
7 at issue in this case?

8 A. Sure.

9 So it's my understanding that the 1929 Act  
10 is the very first time that Congress criminalized  
11 unauthorized entry and re-entry, post-deportation, into  
12 the United States. And, that the basic framework of  
13 that statute carries forward into 1952 and beyond.

14 Q. Thank you.

15 And I just want to get into the historical  
16 sweep leading up to this 1929 piece of legislation,  
17 so can you give me just a summary timeline of the  
18 developments in U.S. Mexico relation, just the  
19 historical developments in immigration policy in  
20 the late 19th and early 20th century preceding the  
21 1929 Act?

22 THE COURT: I'm going to intervene for  
23 a moment, Ms. Gorman.

24 Because you're presenting Professor  
25 Hernandez as an expert witness, do you want the Court

1 to certify her as an expert in any particular area?

2 MS. GORMAN: Oh. Sorry. Yes, Your Honor.

3 And I skipped over that part.

4 Would this court certify Professor Lytle  
5 Hernandez specifically as a historian, but as an  
6 expert in history, with particular expertise in  
7 criminalization, and the criminalization of migration?

8 THE COURT: Does the government have any  
9 objection?

10 MR. WALKINGSHAW: Your Honor, we have no  
11 objection to Professor Hernandez being certified as an  
12 expert in the history of immigration or the history of  
13 border -- border immigration enforcement.

14 If I recall correctly, I believe there  
15 was, uh -- she said a chapter in her book City of  
16 Inmates dealt with the criminalization of immigration.  
17 And I believe the Court is the expert in the law and its  
18 history, so we would ask that the Court sort of -- I  
19 think that designation would not be appropriate, but  
20 that a slightly different one would be.

21 THE COURT: I'm sorry. I'm trying to  
22 understand what is the objection to Professor  
23 Hernandez's expertise.

24 So Ms. Gorman asked the Court certify  
25 Professor Hernandez as an expert in history, with a

1 particular emphasis on criminalization of immigration  
2 and -- well, I think that's where she ended it.

3 MR. WALKINGSHAW: Yes.

4 THE COURT: And what's your objection? Do  
5 you object that Professor Hernandez does not have this  
6 expertise?

7 MR. WALKINGSHAW: I believe it would be  
8 more appropriately characterized as an expertise in  
9 the history of border enforcements, immigration  
10 enforcements, immigration. But criminal -- I didn't  
11 really catch criminalization of immigration in the  
12 discussion that was had.

13 MS. GORMAN: Your Honor, it may be easier to  
14 ask Professor Hernandez where -- where are your areas of  
15 expertise, particularly as a historian? Where have you  
16 emphasized your work?

17 THE WITNESS: Sure.

18 So I often describe myself as a historian  
19 of race, immigration, and police and incarceration in  
20 the United States. More broadly, I have spent most  
21 of my 15, 20 years as a professional scholar looking  
22 really deeply at the intersection between immigration  
23 control and the criminal justice system.

24 MS. GORMAN: So, Your Honor, I think  
25 that maybe Professor Lytle Hernandez description of

1 her own expertise might be a more appropriate basis  
2 for the Court to certify Professor Lytle Hernandez as  
3 an expert, rather than my characterization.

4 THE COURT: Well, for the purposes of  
5 the hearing that's going to be presented -- so, of  
6 course, Professor Hernandez seems to have a wide area  
7 of expertise. I want to focus on the area at issue  
8 here.

9 So, which of her characterizations as to  
10 her expertise would you want the Court to certify,  
11 Ms. Gorman?

12 MS. GORMAN: And I think Professor Lytle  
13 Hernandez said it perfectly, when she talked about the  
14 history in terms of race, policing, and immigration  
15 because those are the three facets that are at issue  
16 in this case. And immigration, of course, I think would  
17 have to include migration, and so -- but I think that  
18 is encompassed, at least, by the word "immigration."

19 MR. WALKINGSHAW: Yeah, that's fine with the  
20 government, Your Honor.

21 THE COURT: All right.

22 What's the request again, Ms. Gorman?

23 MS. GORMAN: I think the Court can tether  
24 the expertise of Professor Lytle Hernandez to her  
25 areas of expertise, specifically with respect to

1 race, policing, and immigration. And that would  
2 encompass border enforcement. I'm using "policing"  
3 very broadly.

4 THE COURT: So is the request that the  
5 Court certify Professor Hernandez as an expert in the  
6 history -- in history, with a particular emphasis  
7 between the intersection between race, policing, and  
8 immigration?

9 MS. GORMAN: Correct, Your Honor.

10 THE COURT: All right. The request is  
11 granted and the Court will so certify.

12 BY MS. GORMAN:

13 Q. Professor Lytle Hernandez, can you give this  
14 court just a historical sweep leading up to this  
15 legislative enactment in 1929? So, a summary of  
16 the timeline and developments in immigration and  
17 immigration policy between the late 19th and early  
18 20th century preceding the Act?

19 A. Sure. I'd be happy to. That's a massive  
20 question. I will try --

21 Q. Sorry.

22 A. -- to keep my answer here around the issues of  
23 how racial animus motivated the passes of immigration  
24 law in the late 19th and early 20th century, leading up  
25 to the 1924 Act in particular.

1           So, the federal government first began to take  
2 the reigns of immigration control in the 1870s and there  
3 were a variety of pressures at play during that time.  
4 One of the most important ones was coming out of the  
5 American west and California, with a concern about  
6 the large number of Chinese immigrants who had arrived  
7 in California during the Gold Rush and during the  
8 construction of the transcontinental railroad.

9           White workers, white settlers in California  
10 opposed the arrival of Chinese immigrants; and, more  
11 important, the notion that Chinese immigrants would  
12 remain permanently in the state and become Chinese  
13 Americans. And so it's really California that pushes  
14 for the first set of racially targeted and explicit  
15 immigration laws, which is the infamous Chinese  
16 Exclusion Act of 1882, which banned the arrival of  
17 Chinese laborers into the United States for 10 years.

18           That same year, Congress passes a series of  
19 other restrictions that are, you know, much more  
20 around contractors or prostitution. And moving out  
21 of the Chinese Exclusion Act, Congress passes a series  
22 of exclusions targeting multiple populations; um,  
23 epileptics, illiterates, people likely to become a  
24 public charge, anarchists and so on. But this  
25 racial animus component remains a driving force in the

1 construction and implementation of immigration law, and  
2 it hits a high fever pitch in 1917, around World War I,  
3 where we passed the 1917 Immigration Act. And that's  
4 an important piece because it introduces the Asiatic Bar  
5 Zone, which bans all persons of Asian origins from  
6 entering the United States, and institutes a literacy  
7 test for all people entering the United States.

8 Now, this is a nice comparison because the  
9 Asiatic Bar Zone clearly racialized. It's explicitly  
10 racialized and it's born out of the Chinese exclusion  
11 period. But, the literacy test is inexplicitly  
12 racialized. It is developed and intended to keep  
13 out southeastern -- southern and eastern Europeans,  
14 in particular, who are presumed to be unable to pass  
15 the literacy test. So, there are two examples there  
16 that are kind of implicit and explicit forms of  
17 racialized control.

18 Then we head into the 1920s, where it becomes  
19 even more intense, the racial animus. The 1920s, in  
20 the Declaration, is a moment in the United States that  
21 people often refer to as the "Tribal Twenties;" that  
22 Arianism is really at a high pitch. Eugenics is a  
23 very popular science of, quote, racial betterment. And  
24 this broader cultural environment pushes toward the  
25 passage of the 1924 Immigration Act, which affirmed the

1 Asiatic Bar Zone, which introduces a new set of  
2 quotas, national quotas, that effectively restrict  
3 immigration to the United States from southern and  
4 eastern Europe.

5 The thing that's interesting about the  
6 national quotas is that they only apply to the Eastern  
7 Hemisphere, and that an exemption was written in for  
8 the Western Hemisphere immigrants. And where that  
9 exemption comes from is this debate that's happening  
10 in the world of white supremacy in the United States;  
11 that there are some folks who believe in, sort of, a  
12 more ethno-racial form of white supremacy, that we only  
13 want to have, sort of, a "whites only" nation. And  
14 those are the nativists.

15 And there's another set of folks who say, well,  
16 we certainly want to have a white dominant society,  
17 but we need marginalized non-white workers to come and  
18 to go, to do the things that we don't want to do.

19 So scholars, like, Lisa Low, and others, talk  
20 about this as there's the dualing sides of White  
21 Supremacy, between the more capitalist and cultural  
22 emphases of that initiative.

23 And so, um, after you get the passage of the  
24 1924 legislation with restrictions on southern, eastern  
25 Europe -- it's called a Nordic victory -- with the

1 Western Hemisphere exemption, you see a pretty rapid  
2 turn to focusing on getting Mexican immigrants included  
3 on the quota that system, or somehow restricted from  
4 entering the United States.

5 And this is sort of the debate in the 1920s  
6 that's circulating around Mexican immigration in  
7 particular, that something leads us into the 1929  
8 legislation.

9 Q. Then talk to me about -- so the Western  
10 Hemisphere is then exempted from this quota, and  
11 you talked about the, sort of, American corporate  
12 interests -- talk to me more about, I guess, how that  
13 animated the legislative history that ultimately  
14 resulted in illegal re-entry in 1929, or how that  
15 tension manifested itself in that legislative history.

16 A. Sure.

17 So after the passage of the 1924 law,  
18 immediately, nativists and Congress begin to lobby  
19 and to forward legislation to get Mexican immigrants,  
20 in particular -- the Western Hemisphere in general,  
21 but Mexican immigrants in particular -- added to the  
22 national quota system. There's two major pieces  
23 of legislation, one in 1926 and one in 1928, that  
24 proposed to do just this. The debates in Congress are  
25 intense. Major employers and industries across the

1 person west go to Congress, hold hearings in protest  
2 to adding Mexican immigrants to the quota.

3 Why?

4 At this moment, they're concerned that they  
5 will be cut off from access to Mexican workers. And  
6 they want Mexican workers, yes, as laborers, but they  
7 want Mexican workers as a particularly racialized  
8 and marginalized and, understood, as a controllable  
9 form, temporary form of labor.

10 And in the end, that lobby wins out and the  
11 nativists are furious in Congress. And Albert Johnson,  
12 who is one of the leading members of Congress pushing  
13 for immigration control and adding Mexicans to the quota  
14 system, you know, by 1928, he just said, look, we're  
15 not going to be able to get Mexicans added to the quota  
16 system. The debates have been too intense. So, we're  
17 going to have to pursue this through other means. And  
18 the next year you get the 1929 Act, which criminalizes  
19 unauthorized entry and re-entry into the United States.

20 Now, I want to add something here. This is  
21 really important about how this scheme was developed  
22 with Mexican immigrants, sort of, in mind as being the  
23 primary targets of that legislation. There were a  
24 series of studies conducted by the Immigration Service  
25 in the 1920s, which found or asserted that about half

1 of the Mexican immigrants who enter the United States  
2 entered without authorization, if not more.

3 In 1928, the Department of State discourages  
4 counselor officials, U.S. counselor officials in  
5 the United States from issuing visas to Mexican  
6 immigrants, so it becomes extraordinarily difficult  
7 for Mexican immigrants, in particular workers, to get  
8 a visa into the United States, around 1928 and 1929.

9 And by the late 1920s, the U.S. Border Patrol,  
10 which had been established in 1924, had really recast  
11 the popular image of the so-called, quote, illegal  
12 immigrant. In the late 19th century, that iconic  
13 illegal was a Chinese immigrant. Border Patrol  
14 practice -- which if you want to get into, we can  
15 certainly do -- shifted that notion. So the people,  
16 when they sort of conjured up the image of who was  
17 undocumented, by the late 1920s, they would conjure  
18 up an image of a Mexican immigrant.

19 All this comes together to create a logic of  
20 the moment that, if we criminalized unauthorized entry  
21 into the United States, we could be assured that the  
22 bodies that are going to be delivered up are going  
23 to be Mexican immigrants in particular, as opposed to  
24 unauthorized immigrants in general.

25 Q. When you talk about the desire to have a

1 temporary labor force, what is it about Mexican  
2 migrants that makes them desirable as workers? What  
3 is -- I mean, is it there vulnerability? Their -- I  
4 mean, what -- is it stereotypes? What is it about the  
5 migrants from south of the border that makes them such  
6 a desirable labor force, that you have such intense  
7 tension between, I guess, the eugenics and corporate  
8 interests?

9 A. That's a good question.

10 I would say that there's nothing about them  
11 in particular as human beings. It's about the social  
12 structure into which they're entering. So by the  
13 1920s you have, across the southwest, a social system  
14 in place, a racialized subjugation system in place  
15 that mirrors what's happening in the American South.

16 So what we know in the American south as the  
17 Jim Crow system is becoming, in the southwest, what we  
18 call the Juan Crow system, where Mexican children are  
19 separated in the public school system; where Mexican  
20 immigrants are unwelcome, and sometimes in explicit  
21 forms, especially in Texas, not allowed to sit in  
22 the restaurant, right, police systems across the  
23 southwest disparately target Mexican immigrants, or  
24 policing Mexican Americans as well.

25 So this Juan Crow regime, and you read it, I

1 believe, in the Declaration -- let me find the page  
2 number for you -- uh, was something that the employers  
3 believed in across the southwest as their mechanism for,  
4 quote, we can and do control them. So, it's the forms  
5 of racialized subjugation that Mexican immigrants  
6 enter into that makes them the desirable laboring  
7 population.

8 Q. So were Mexican immigrants, did they have any  
9 sort of protections; or, did they have less protections  
10 then, let's say, American citizens?

11 A. Do you mean as sort of labor protections, formal  
12 labor protection or -- could you clarify yourself.

13 Q. Yes.

14 A. Yeah. Uh, no, they don't have any more  
15 protections. I mean, I would say that they are more  
16 vulnerable to policing, whether it be local policing,  
17 border patrol policing in particular. Uh, that -- you  
18 know, I think that would be my answer.

19 Q. So you started talking about, I think, two  
20 things. One is, like, the ability to exclude. And  
21 one is the ability to control. Is that, like, a fair,  
22 accurate -- or sort of a fair representation of at least  
23 your understanding?

24 A. Yeah. I like the way you put that.

25 So the nativists are looking to exclude. The

1 agribusiness, the railroad, the employers across the  
2 southwest, they're looking to control. And they really  
3 kind of -- they come to a compromise. And one of the  
4 things that's really interesting that happens in  
5 the 1920s, is the employers are learning the power of  
6 deportability. And they say this expressly in the  
7 Congressional Record, when they go to Congress, like,  
8 uh, they're saying -- it's in the Declaration -- one  
9 of the things we like about Mexican workers is that  
10 they're, quote, deportable. They won't stick around.  
11 If we have trouble with them, we can always, you know,  
12 pick them up and kick them out.

13 Agribusinees flips that and says, well, what  
14 do you want us to do, invite African Americans or black  
15 Puerto Ricans in the U.S. to do this work? Well,  
16 they're not deportable, and that's not the kind of  
17 labor that we want. They're not even -- we want to  
18 make sure that they can be removed.

19 So there's, absolutely, an explicit dynamic of  
20 racialized labor control that is happening during this  
21 time period.

22 Q. Then is it your opinion that the illegal re-entry  
23 provision of the 1929 law was intended to target  
24 Latinos?

25 A. That is my professional opinion. Yes.

1       Q. And I know that I -- I don't want to go -- you  
2 know, I understand your expertise is largely 1929, but  
3 I also want to talk about did they have to accommodate  
4 illegal re-entry or the criminalization of this  
5 migration? Do they have do anything, like build prisons  
6 or jails or places to hold people?

7       A. Well, the impact of this new legislation was  
8 immediate. And I write about this in my book City of  
9 Inmates. The number of prosecutions increase. The  
10 number of Mexican immigrants in particular being  
11 imprisoned on this charge. And that's in the Bureau  
12 of Prisons annual reports, the attorney general annual  
13 reports. But, it's also in the Bureau of Prisons  
14 internal correspondence records, where a lot of this  
15 material is available.

16           And so they build three new prisons, largely to  
17 accommodate the number of Mexican immigrants being  
18 incarcerated on what would become 1326.

19           You know, it's really interesting -- and I  
20 believe it's the Attorney General's annual report of  
21 1930 -- they take a moment and pause and say, you know,  
22 prior to 1929, we just had about a 1,000 prosecutions  
23 per year. Post-1929, immediately, we've got about 7,000  
24 prosecutions this year. And they write that is due to  
25 the passage of the Immigration Act of March 4th, 1929.

1           And so they build a Latino prison, the Tucson  
2 Prison Camp, which is outside of Tucson, and,  
3 eventually, Terminal Island, outside of Los Angeles.  
4 Largely motivated by the need to incarcerate people  
5 on immigrations offenses.

6           THE COURT: Ms. Gorman, would you -- I'm  
7 going to intervene for one moment. Give me one moment  
8 to take a short break here. I need to repair or to  
9 fix a problem.

10           MS. GORMAN: I'm going to stop my video  
11 for a second because I'm getting sounds from my son's  
12 room.

13           THE COURT: All right. Thank you, counsel.

14           MS. GORMAN: Sorry, Your Honor. I don't  
15 know if anyone could hear, but I could hear my son.  
16 He's in school.

17           THE COURT: I'm ready to resume then, if  
18 you are.

19           MS. GORMAN: Well, unless this court has  
20 specific questions for Professor Lytle Hernandez, you  
21 know, I can pass this witness.

22           THE COURT: I'm sorry. What was the  
23 question?

24           MS. GORMAN: I said unless the Court -- and  
25 I wanted -- and I meant to say this at the beginning,

1       that the Court should feel free to interrupt me because  
2       I think what's relevant is also what the Court wants  
3       to consider in this hearing. But unless the Court has  
4       additional questions for Professor Lytle Hernandez, I  
5       would pass the witness.

6                   THE COURT: All right. Thank you. I do  
7       not.

8                   Mr. Walkingshaw.

9                   MR. WALKINGSHAW: May I proceed?

10                  THE COURT: Yes.

11                  MR. WALKINGSHAW: Thank you, Your Honor.

12                   **CROSS-EXAMINATION**

13       BY MR. WALKINGSHAW:

14       Q. Good morning, Professor.

15       A. Good morning.

16       Q. And I apologize, I've heard it both ways. Do you  
17       prefer Professor Lytle Hernandez or Professor Hernandez?

18       A. Lytle Hernandez, please.

19       Q. It's not everyday that I get to speak with a  
20       MacArthur Genius, so I want to make sure I get it  
21       right.

22                  So are you familiar with the motion that's been  
23       filed in this case?

24       A. Yes.

25       Q. And it cites your work in a number of places,

1       correct?

2       A. I believe so.

3       Q. Both Migra, and your book, City of Inmates.

4       A. I believe so.

5       Q. Yeah. So -- and you referenced a little bit  
6 ago the Attorney General reports regarding enforcement  
7 post-1929, correct?

8       A. Correct.

9       Q. Okay.

10           So I'd like to ask you about a few things related  
11 to that. In -- in the motion, it quotes your work as  
12 saying: "Within a year of the 1929 law's passage, the  
13 government had prosecuted 7,001 border crossing crimes.  
14 By 1939, that number rose to over 44,000."

15           You were speaking about that a bit ago, correct?

16       A. Correct.

17       Q. So that statistic you cite, what does "border  
18 crossing crimes" mean? Is there a particular statute?  
19 Is it divided up? Uh --

20       A. Yeah. It's described in the record, especially  
21 in the annual reports, as Immigration Act crimes.  
22 That's sort of the quote. When you look more deeply  
23 into the narrative of the annual reports -- for example,  
24 I cited the 1930 annual report in which it's attributed  
25 -- that rise is attributed to the enforcement of the

1 Immigration Act of March 4, 1929.

2 And then also when you look really closely to the  
3 Bureau of Prisons' records, it's clear that they're  
4 talking about people who are arrested in prison for  
5 unlawful re-entry in particular.

6 Q. Okay.

7 And the decade between 1929 and 1939 largely  
8 corresponds to the Great Depression, correct?

9 A. That's correct.

10 Q. And jobs in the United States were largely  
11 understood to be scarce in this period, correct?

12 A. Very correct.

13 Q. And you've written in your book Migra, that:  
14 "Mexican labor immigration surged with the massive  
15 expansion of southwestern agribusiness in this period,"  
16 correct?

17 A. The surge happened during the 1920s.

18 Q. Okay. So -- and you've cited statistics in  
19 that period suggesting that "border crossings undertaken  
20 by Mexican nationals skyrocketed to over a million in  
21 that decade."

22 Yes?

23 A. During the 1920s; correct.

24 Q. Yes.

25 And you stated in the past -- I believe as

1 recently as last week in another hearing -- "immigration  
2 requires a push, a pull, and a process," correct?

3 A. Correct.

4 Q. Can you explain a little bit what you mean by  
5 that?

6 A. Sure.

7 Well, this is established in immigration theory  
8 that you need a reason why people want to leave their  
9 homes, right? That's a pretty deep and profound need  
10 to leave your home. And that could be many things. It  
11 could be war or violence or it could be the need for  
12 labor. Um, it could be a family needs to reconnect with  
13 someone who has left. The needs could be many. That  
14 push can come from many factors.

15 A pull factor is why do you choose to go where  
16 you go? And a pull factor can be your family is in  
17 this other place or better jobs are in that other place  
18 or safety and security seems to be in that other place.  
19 Those are all kind of pull factors.

20 The other piece that's really important that, you  
21 know, the last, really, 20, 30 years, that migration  
22 scholars have taken a more closer look at is that  
23 process piece, right? There has to be some way for  
24 you to get from point A to point B, so that you'll  
25 go there. And during this time period for Mexican

1 immigrants, that process was largely the railroad,  
2 right, which had been built by U.S. investors in Mexico.  
3 It could also be by foot, but, largely, the railroad  
4 played a big role.

5 Q. Okay. So fair to say in this period the -- as  
6 far as Mexican labor immigrants went, the push from  
7 Mexico would be a dearth of economic opportunity,  
8 correct?

9 A. Yes.

10 Q. And then a pull from the United States would be  
11 a severer economic opportunity, correct?

12 A. Yeah. That's correct.

13 And I would frame that as a more integrated  
14 story, in the sense that what creates the push factors  
15 in Mexico is the increasing integration of the U.S.  
16 in Mexican economies that begins, um, late 19th century,  
17 but it really escalates as you move into 1910, the  
18 1920s, and continued, even, into the 1930s.

19 And so it's the rise of U.S. investment in  
20 Mexico, with the railroads and the mines and cotton  
21 and whatnot, that displaces a rural population, forces  
22 them to find work which is insufficient and which has  
23 segregated, uh, protocols, even within Mexico, according  
24 to, sort of, U.S. Gemco (phonetic) law. And then people  
25 begin to take those railroads north. And, they're often

1 invited into the United States by labor recruiters.

2 Q. And they're looking for jobs, correct?

3 A. Yes. Certainly.

4 Q. Yeah. And it's fair to say that this pull,  
5 this looking for jobs is the trend that remained a  
6 factor driving labor migration from Mexico to the  
7 United States in the decades following the 1920s,  
8 correct?

9 A. That is correct.

10 Q. Okay.

11 In fact, undocumented immigration also rose  
12 during the 1940s, correct?

13 A. That's correct, alongside the Bracero program.

14 Q. Right.

15 And workers in America who competed with these  
16 immigrants for jobs, typically, opposed this migration,  
17 correct?

18 A. Yeah, until the 1970s, labor option was opposed  
19 to immigrate in general.

20 Q. And you wrote in your book Migra, specifically,  
21 "Leaders of the Mexican American middle class --" so  
22 these are people of Mexican descent, who are American  
23 citizens "-- in the 1950s, supported aggressive  
24 immigration enforcement," correct?

25 A. Yeah. I mean, that goes back to the 1920s.

1       Certainly, you see that at politics and in place.

2       Q. And one of the reasons they did that I believe  
3       you wrote in Migra, is because they thought that  
4       increased border enforcement would improve job security  
5       and living conditions for Mexican-American workers,  
6       correct?

7       A. Yeah. There was a notion that there was a, sort  
8       of, zero sum game of jobs, right, and that people of  
9       Mexican descent, largely because of segregation in the  
10       United States and because of that racial subrogation,  
11       gave this notion that Mexican-origin folks had to fight  
12       for the same jobs as to opposed to having all jobs open  
13       to them, and that certainly helped to create this notion  
14       that they were in competition with each other.

15           There was this really great labor organizer -- I  
16       know. I'm getting a little off-topic -- named Ernesto  
17       Galarza during this time period. He tested that.

18       Q. Thank you.

19           Although fair to say that this hostility to  
20       labor competition isn't unique to the Mexican-American  
21       community in spirit, correct?

22       A. Correct.

23       Q. Right.

24           It's generally people who, who believe that  
25       Mexican immigrant laborers might compete with them

1 for jobs, typically, are hostile to that proposition.

2 Yeah?

3 A. It -- this is correct. It's more complicated.

4 Of course there's another side to the story,

5 that there's an emerging immigrant right to movement.

6 There's an emerging analysis about what's the connection

7 between why Mexican immigrants leave Mexico, and why

8 they come to the United States, and that we're all,

9 actually, part of the same economic system, as opposed

10 to on, sort of, separate sides; when people need to go

11 back to their place. It's all the same place. It's all

12 the same economic system.

13 Q. Turning to some other maybe drivers of

14 enforcement, you also wrote in Migra, you went down

15 to the archive in Mexico and you learned, uh, that

16 there was a Mexican Department of Migration that started

17 in, I believe, 1926, correct?

18 A. That's correct.

19 Q. And this is actually a bit of a surprise to

20 you at the time, if I'm not mistaken. It was something

21 you didn't know about before -- other story -- and I

22 apologize. You're not -- and I'm kind of rambling on --

23 but it was something that you didn't know prior to your

24 trip to Mexico, correct?

25 A. Well, I went there because I'd seen in the

1 archive little hints that that might be the case. And  
2 I was persistent because I'd seen those things.

3 But, yes, that was relatively new to me.

4 Q. All right.

5 And this Department of Mexican migration,  
6 its focus was trying to prevent Mexican workers from  
7 illegally crossing into the U.S., right?

8 A. From crossing, period, largely, there was a  
9 strong opposition. For Mexican national reasons, you  
10 know, concerns about how Mexican immigrants were treated  
11 north of the border. There were concerns by Mexican  
12 employers, or U.S. employers in Mexico, about losing  
13 access to labor.

14 Those are, sort of, the general politics of that  
15 time period.

16 Q. But if the U.S. Border Patrol can be understood  
17 as serving a function to keep outsiders out, the Mexican  
18 Department of Migration's function was to keep Mexicans  
19 in, correct?

20 A. I think this comes back to how we understand  
21 the inside and the outside, right?

22 So you have like a -- also in Migra, Ernesto  
23 Galarza, and others, who are really thinking about --  
24 and you have to understand the importance of Mexico in  
25 the rise of the United States economy in the late

1       19th and through the 20th century; that these are  
2       conjoined initiatives, economies, and so there is no  
3       inside/outside. There is an increasingly integrated  
4       space for a laborer. And that critique is developing  
5       and growing stronger across the 20th century.

6           Q. All right.

7           But you did also write in Migra, did you not,  
8       that Mexican officials, including the Department of --  
9       the Mexican Department of Migration, they lobbied  
10      the U.S. Department of State, the U.S. Immigration and  
11      Nationalization Service, and the U.S. Border Patrol to  
12      improve border patrol control this period, correct?

13          A. That is correct.

14          Q. And, to deport Mexican nationals who broke  
15       U.S. and Mexican law by illegally entering, correct?

16          A. Yeah. They wanted to control the flow, as well,  
17       of Mexican immigrant laborers into the United States.  
18       And if we're talking about the 1940s, that's where the  
19       Bracero program comes from, is this bi-, trilateral  
20       set of agreements about controlling the flow of  
21       migrants.

22          Q. All right.

23           And so fair to say that, in part, border  
24       enforcement decisions or control of migration across  
25       the southern U.S. border at this time was also impacted

1 by foreign policy?

2 A. Foreign policy, certainly, is a player in this.

3 And I also go to, you know, lengths in Migra to  
4 talk about the power relationship between the United  
5 States and Mexico; that Mexico is a junior partner in  
6 this partnership, and that they're not dictating, by  
7 any means, to the United States Government about how  
8 this is going to go. Rather, the United States  
9 Government is receptive because it's aligned with  
10 their political, cultural interests.

11 Q. Although you also write in Migra, do you not,  
12 that in 1943 -- you mentioned a little ago the Bracero  
13 program, which is a program through which Mexican  
14 immigrant laborers can receive legal status in the  
15 U.S. to work, correct?

16 A. Yeah. They're short term contracts, usually  
17 six months.

18 Q. So is it not true that in 1943, the Mexican  
19 Embassy in Washington D.C., warned the U.S. Department  
20 of State that if control was not established over  
21 illegal immigration into the U.S., that Mexico would  
22 cut off the Bracero program?

23 A. This is true.

24 Q. Okay.

25 Now it's also true that in the early years of

1       the -- well, actually, I beg your pardon. Let me take  
2       a brief step back.

3               Let's talk about the Bracero program for a  
4       moment, if we could --

5               MS. GORMAN: Your Honor, just to be  
6       clear, I tried as much as possible to streamline the  
7       presentation given our limitation and how, sort of,  
8       Professor Lytle Hernandez focused on the periods leading  
9       up to the periods of 1929. So this is -- I mean, it's  
10      up to Court whether to permit this line of inquiry, but  
11      it is, certainly, beyond the scope of the direct.

12              MR. WALKINGSHAW: With respect, Your Honor,  
13      I believe there was commentary about enforcement  
14      patterns following the passage of the 1929 laws act.  
15      I think it's only fair that we inquire into some of the  
16      other driving factors. Obviously, racial animus has  
17      been discussed in Professor Lytle Hernandez's testimony.  
18      It's a complicated story. I think the other factors  
19      should -- are fairly discussed and are within the scope  
20      of cross.

21              THE COURT: Because Ms. Gorman's direct  
22      examination did touch on enforcement, I'm going  
23      to permit the government to explore the area of  
24      enforcement.

25              Even if what was touched upon was brief, I

1 want, as I indicated earlier, to have a thorough record.  
2 And I want to have the government be able to examine  
3 the expert witness as well, not just with the scope  
4 presented today, but with the scope of the content of  
5 the Declaration that's been offered in support of the  
6 motion.

7 So to the extent there's an objection, I  
8 overrule the objection.

9 Mr. Walkingshaw, you want to repeat your  
10 question?

11 MR. WALKINGSHAW: Certainly.

12 Um -- might withdraw the question and start  
13 anew, if that's all right, Your Honor.

14 THE COURT: It is your question. You may  
15 rephrase if you would like or withdraw if you like.

16 MR. WALKINGSHAW: Yeah. I have a hard time  
17 summing up what I said before.

18 BY MR. WALKINGSHAW:

19 Q. Professor Lytle Hernandez, the Bracero program  
20 that we discussed, started in 1942, correct?

21 A. Right.

22 Q. That was extended in 1951?

23 A. Correct.

24 Q. It ran until 1964, correct?

25 A. Correct.

1       Q. So the start of the Bracero program happened  
2 roughly around the onset of World War II, correct?

3       A. Yes. Post-U.S. entry into the war.

4       Q. Right.

5               And you wrote in Migra that this triggered  
6 increased national security and geopolitical concerns,  
7 given that the U.S. shared a 2000-mile border with  
8 Mexico, correct?

9       A. Correct.

10      Q. And you wrote that the U.S. State Department put  
11 pressure on the INS and Border Patrol to close the door  
12 to undocumented migrants during this time, correct?

13      A. Correct.

14      Q. In part, because of the national security concern  
15 presented by having a forced border during the world  
16 war, correct?

17      A. In part, yeah.

18      Q. Yeah.

19      A. Also, you know, to keep Mexico, you know, a solid  
20 partner during this time period.

21      Q. So, again, foreign policy concerns, in part,  
22 correct?

23      A. (No response.)

24      Q. Now you also talked about how there's an  
25 integrated system going on here, correct?

1           A. The economy we're talking about?

2           Q. Yes. I apologize. I suppose that's a bit  
3 vague.

4           But the enforcement of a border control between  
5 the U.S. and Mexico, that was also something in the  
6 integrated system, incorporating institutions from the  
7 United States, and institution from Mexico, correct?

8           A. Yeah. From the 1940s and '50s, you see  
9 increasing integration in immigration control.

10          Q. Right. The U.S. Border Patrol and the Mexican  
11 Department of Migration, they worked together during  
12 this period. Yes?

13          A. Yes. Uh-huh.

14          Q. Okay.

15          Now, is it correct you wrote this in Migra  
16 that: "By the late 1940s, one-third of all  
17 apprehensions were of repeat offenders who had  
18 previously been deported," correct?

19          A. That's correct.

20          Q. And some were repeat offenders who had been  
21 apprehended and deported several times in a year,  
22 correct?

23          A. That's correct.

24          Q. And others had been apprehended and deported  
25 several times in a day, correct?

1 A. Correct.

2 Q. Is it correct in this period that the Border  
3 Patrol tried all different kinds of strategies to deter  
4 repeat offenders from returning?

5 A. Yes. That's correct.

6 Q. All right.

7 They tried detention?

8 A. (Nodding head affirmatively.)

9 Yeah.

10 Q. And you have to -- thank you.

11 Just for the benefit of the court reporter, if  
12 you could respond orally -- although I am going to go  
13 through a list, so I could understand why you started  
14 nodding.

15 But, uh, they do bus lifts?

16 A. Correct.

17 Q. They did boat lifts?

18 A. Yes. All this was happening integration.

19 Q. They erected fences?

20 A. Correct.

21 Q. And they even took unsanctioned actions, like  
22 shaving repeat offenders' heads, correct?

23 A. Yes.

24 Q. Uh, but border patrol officers would still find  
25 previously deported migrants, even after going through

1 some of these procedures, correct?

2 A. That is correct.

3 I mean, all of this activity is happening, you  
4 know, I would argue, uh, yes, within foreign relations,  
5 with an (unintelligible) of foreign relations, with an  
6 integrated economy, around labor concerns, concerns  
7 about what's emerging as the Cold War.

8 Racial animus is also at play. There is no way  
9 in which we can understand the politics of head shaving  
10 as something that would have been tolerable for other  
11 than Mexican immigrants in this time period. And the  
12 involvement of the Mexican government does not mean  
13 that rational animus is not at play. Mexico has a long  
14 and deep history of race and subrogation, especially for  
15 indigenous folks.

16 So, the story of race transcends the border.

17 Q. Thank you, Professor Hernandez. I do appreciate  
18 the analysis, although in the interest of time, with  
19 respect, if you wouldn't mind answering my questions,  
20 I think the analysis was put forth in your testimony.  
21 And I know Ms. Gorman will be making these arguments  
22 to the Court.

23 So just for purposes of today's proceeding, if  
24 you wouldn't mind answering the questions that I put to  
25 you, I think things will go a little faster -- although

1 I don't believe I have a ton more -- but can we agree  
2 that that's fair?

3 A. Well, I just want to be full in my answers, so --  
4 everything is complicated, so yes/no is not always the  
5 accurate answer. So when I think that I need to give a  
6 little bit more context, I would like to be able to do  
7 that.

8 Q. Okay. Understood.

9 So there's another citation, and I believe it's  
10 to your work from City of Inmates, in the motion. It  
11 refers to the same -- it, basically, immediately follows  
12 the sentence we were discussing at the beginning of  
13 cross-examination.

14 So, from 1929 to 1939, it says: In each of these  
15 years, individuals from Mexico comprise no fewer than  
16 84 percent of those convicted, and often made up as many  
17 as 99 percent of defendants for illegal, uh, for border  
18 crossing crimes, correct?

19 A. Correct.

20 Q. Now, the majority of undocumented migrants in  
21 this period crossing the Mexican border were Mexicans  
22 at that time, correct?

23 A. Certainly a substantial number. I would also --  
24 it's really important to understand the role that the  
25 U.S. Border Patrol plays in identifying and arresting

1 people. So this is why telling that law with the  
2 (unintelligible) Border Patrol is really, really  
3 significant, and why they came to focus on Mexican  
4 immigrants.

5 So the 1924 Immigration Act, which dominates  
6 immigration control between 1924 and to 1965, really,  
7 there is a plethora of possibilities for immigration  
8 law enforcement, right? People likely to become public  
9 charges. People engaged in prostitution. There's  
10 lots of things that they could do. But because of the  
11 cultural and political dynamics of the establishment of  
12 the Border Patrol, and who was hired as Border Patrol  
13 officer, and where they worked, they made a set of,  
14 sort of, granular decisions, at the local and regional  
15 level, that shifted away from broad enforcement of the  
16 immigration law, and all the possibilities, and targeted  
17 their attention on Mexican immigrants. This is the way  
18 that they built power for themselves as immigration law  
19 enforcement officers.

20 So, this is important because how you get from  
21 a notion of all these different people crossing the  
22 border -- people with trachoma who were kept out, people  
23 likely to become public charges -- to just largely  
24 Mexicans being delivered up as the undocumented, being  
25 delivered up as the people who are arrested and

1       imprisoned, that happens in the -- in the sort of  
2 vestibule of immigration law enforcement. So, it's  
3 really, really important to see that how you go from  
4 law to law enforcement, to who gets imprisoned, happens  
5 at that juncture.

6       Q. Okay. Thank you, Professor.

7           I do want to make sure that my question did get  
8 answered. The question is, yes, a substantial majority,  
9 they were Mexicans, correct?

10      A. Well, a substantial number. Right?

11      Q. Okay.

12      A. So you're talking about what we don't know about  
13 unauthorized immigrants.

14      Q. Okay.

15      A. There's -- certainly, we don't know the number,  
16 so "majority" is tough. "Substantial number," certainly  
17 is true.

18      Q. Okay.

19           Now, you were speaking a little bit ago about  
20 enforcement priorities. Isn't it correct, as you  
21 wrote in Migra, that by the mid to late 1930s, the  
22 U.S./Mexico border was not the epicenter of border  
23 control activity, correct?

24      A. Yeah, it wasn't as early as the 1920s. That  
25 increases over time.

1       Q. And by the point of the mid/late 1930s, there  
2 were more officers on the U.S./Canadian border, than in  
3 the U.S./ Mexico border, correct?

4       A. Yeah. That border is longer. So when the  
5 border was started, there were even more officers or  
6 allocations for the northern border. Slowly, for the  
7 vast reasons I was just discussing about, sort of,  
8 border patrol force in the U.S./Mexico border region,  
9 that shifts allocations to the southern border, and  
10 that that really ampli -- ramps up during World War II.

11      Q. Now, roughly, in this same period, I believe  
12 in Migra, you cite that mid 1920s, "80 to 95 percent  
13 of California's laborers were people of Mexican origin,"  
14 correct?

15      A. Of the working class, right, of --

16      Q. The laborers -- I beg your pardon. I didn't mean  
17 to interrupt you.

18           But the laborers -- yeah, so the working class.  
19 Laborers, roughly, to use equivalent terms?

20      A. Well, I mean, laborers could be highly skilled  
21 laborers. It's a general term. But, certainly, the  
22 agricultural workforces, street workers, all of that.  
23 Yes, Mexicans are a substantial portion of that.

24      Q. And during this same period, I believe you wrote  
25 that 80 to 98 percent of Texas' working class were

1 Mexican, correct?

2 A. Of the low wage workforce, yes.

3 Q. Right.

4 And, again -- I believe we discussed before -- a  
5 substantial pull for these people, these working class  
6 people, is increased economic opportunity, correct?

7 A. Jobs. Yes.

8 Q. Exactly.

9 Now, I believe you also wrote in Migra, so you  
10 would agree then, that at least in the 1930s, when  
11 prosecution for entry crimes increased, the fines and  
12 incarceration that were imposed, uh, diminished the  
13 basic pecuniary function of labor immigration, correct?

14 A. Yeah.

15 Q. If you get fined, you lose your money, correct?

16 A. If you get fined, you lose your money. If you  
17 go to prison, you can't work.

18 Q. Right. So criminal penalties served as  
19 a deterrent to some folks seeking these labor  
20 opportunities, correct?

21 A. It served as a deterrent in its actual form, but  
22 it also served as a mechanism of making Mexican laborers  
23 more vulnerable. Right? Because of the way the law was  
24 racially enforced, Mexicans were more vulnerable to  
25 arrest. And so it's a tool that agribusiness,

1 especially during this 1930s period, is using in  
2 conjunction with border patrol officers, to make  
3 sure that Mexican workers remain temporary, so-called,  
4 quote, docile, um, and controlled.

5 Q. Yeah.

6 You testified on direct about a social structure  
7 that rose up.

8 A. Juan Crow.

9 Q. Yes.

10 And I believe you said it made these workers  
11 more desirable for certain kind of employers, correct?

12 A. Yeah. It was a racialized form of social  
13 hierarchy that's known in the American south as  
14 Jim Crow, in the America southwest is Juan Crow --

15 Q. Right?

16 A. -- and that's what creates them as a marginalized  
17 workforce. Yes.

18 Q. Right.

19 You said that the undocumented status of  
20 these folks allows them to be subject to increased  
21 control by their employers, correct?

22 A. Well, there's the racialized system, right,  
23 which is that Juan Crow. And then undocumented status  
24 accentuates that, and I would say that the threat of  
25 imprisonment only deepens that marginalization.

1 Q. Right.

2 I believe you testified in the past that, you  
3 know, for folks who are undocumented, there's always the  
4 threat, "We can just call the Border Patrol," correct?

5 A. That's correct.

6 Q. It's a threat that can be made against these  
7 people?

8 A. Correct.

9 Q. And, in effect, it makes them more exploitable,  
10 correct?

11 A. Correct.

12 Q. You can pay them lower wages, correct?

13 A. Yeah.

14 Q. You could submit them to, uh, working conditions  
15 that wouldn't be accepted, or might even be illegal in  
16 terms of standards put forth for people with status,  
17 correct?

18 A. Yeah. So, there's status and non-status. But,  
19 again, we have to understand all this -- and Migra goes  
20 into this in depth, and so does City of Inmates -- that  
21 that's a racialized concept of who is undocumented by  
22 this time period, and who gets policed, who that threat  
23 is meaningful for, is a racialized situation and scheme.

24 Q. But as you just said, Professor, isn't it correct  
25 that undocumented status for some of these people

1 accentuates that threat?

2 A. Undocumented status, certainly. The fact,  
3 though, is also that that status has deeper meaning  
4 for people who are more vulnerable to the enforcement.

5 Q. And folks who are undocumented are necessarily  
6 more vulnerable to enforcement, are they not, Professor?

7 A. Racialized workers who are the targets of  
8 policing are the most vulnerable to enforcement per  
9 immigration law.

10 Q. With respect, Professor, the answer to my  
11 question is yes; undocumented people are more vulnerable  
12 to these kinds of enforcement?

13 A. Only within a racialized context.

14 Q. So you do not agree that, um, in a context such  
15 as, uh -- Canadian workers, for example. The Canadian  
16 worker, without -- in the U.S. illegally, without any  
17 kind of status, you do not agree -- and let's say for  
18 purposes of the example, that this person was white.  
19 The person is not more vulnerable than a similarly  
20 situated Canadian white worker who has a visa?

21 A. Uh, that is certainly the case.

22 In addition to that, their sense of vulnerability  
23 is deeply impacted by the likelihood of them being  
24 targeted for arrest, of them being brought to the  
25 consequences of that status.

1 Q. Okay.

2 MR. WALKINGSHAW: I have no further  
3 questions.

4 Thank you, Professor Lytle Hernandez, for  
5 your testimony today.

6 I'll pass the witness.

7 THE COURT: Ms. Gorman.

8 THE WITNESS: You're welcome.

9 **REDIRECT EXAMINATION**

10 BY MS. GORMAN:

11 Q. Professor Lytle Hernandez, I think there were so  
12 many important points to hit on and I want to use your  
13 time as wisely as possible, but one of the interesting,  
14 sort of, differences that the government brought up was  
15 related to Canada.

16 So, can you talk a little bit about the  
17 differences between the treatment of Canadians, both  
18 legally, like, you know, in terms of visa overstaying  
19 or regularizing status, and people south of the border.  
20 So, generally, Mexican people or Latinos?

21 A. Yeah. So there's scholar historian named  
22 Mae Ngai, who has written a considerable amount on  
23 this. And one of the things that she helps us to  
24 see and to understand is the development of something  
25 that was called the Pre-examination program that was

1 available, I believe starting in late -- in the 1920s,  
2 that people who did not have regular status or proper  
3 paperwork, for whatever reason, could get pre-examined  
4 in the United States, go back -- go to Canada, and then  
5 re-enter legally into the United States.

6 So this is a scheme that's only available in  
7 Canada, which is sort of setup for people who are -- for  
8 immigrants who are close to the Canadian border, have  
9 access to the Canadian border. And, you know, largely,  
10 it was European immigrants that crossed through Canada  
11 who had access to the Pre-examination program.

12 So that's one example of how regularization  
13 was made available to, disproportionately, European  
14 immigrants.

15 Q. And what were the differences in terms of  
16 Mexico for -- what would be the analogous situation  
17 in Mexico that was or was not available to those  
18 individuals?

19 A. There was no pre-examination process that was  
20 available in Mexico or through Mexico. And again, as  
21 I had mentioned earlier, by 1928, consulate officials  
22 in Mexico were systematically denying visas to Mexican  
23 workers in particular.

24 Q. So -- which actually brings up an interesting  
25 point.

1           Did Congress ever decide to criminalize visa  
2 overstaying?

3       A. I am unaware of any such move.

4       Q. But, Canadians did have access to visas that  
5 Mexicans did not?

6       A. It was not -- the Pre-examination program did not  
7 have these national limits to it. But, the way in which  
8 it's set up, because you have to return to Canada to  
9 cross, it meant that it was more available to people  
10 who crossed the Canadian border as opposed to people who  
11 crossed the Mexican border.

12      Q. And a few times I noted you tried to provide a  
13 racial context to some of the prosecutor's questions,  
14 and I want you to be able to elaborate on that.

15           How do you, as a historian, suss out racial  
16 animus, when you have so many competing interests,  
17 right? You have economic interests and foreign policy.  
18 So, how do you conceptualize race? And then how do  
19 you suss out racial animus when you're studying this  
20 issue?

21      A. You know, that's a good question. I mean, of  
22 course, the world is always complicated and there are  
23 many dynamics of play in any congressional decision.  
24 Why is that, you know, I, as a scholar of race and  
25 immigration policing, think that immigration law and

1 immigration control are highly racialized?

2 First, the entire body of scholarship of  
3 immigration law, I'm within the mainstream of that  
4 scholarship that's discussing, um, the rise of the  
5 1924 Act and heading into the 1929.

6 Also, let's -- can I read you a couple things  
7 from the, sort of, pre-1929 period about --

8 Q. Sure.

9 A. -- this distinction, from their own words, not  
10 mine?

11 We can talk about racial capitalism and how  
12 racial formation and class are always bound together.  
13 That the way that you extract (unintelligible) from  
14 people is by dehumanizing and subjugating, so that,  
15 you know, that extra portion of profit comes through  
16 that racialization process. But, let's take the words  
17 of a people who were passing immigration law themselves.

18 So, for example, we know eugenics was a primary  
19 science that was utilized as we're heading into the  
20 1924 Act, and the efforts to include Mexicans in the  
21 quota. After the 1924 Act, you get a Society of  
22 America, which Howard Johnson was the President of  
23 in the mid 1920s, and it issues a series of reports.  
24 I want to read from a couple of those reports.

25 Why?

1           Because they really hit on this issue of race  
2 versus the economy.

3           So from a second report of the subcommittee on  
4 Selected Immigration of the Eugenics Committee of the  
5 United States of America, published by the Eugenics  
6 Society of America, quote: "Immigration Act of 1924,  
7 established a new immigration policy. It expressed  
8 the conviction of the American people that immigration  
9 is a long-time investment in family stocks, rather  
10 than a short term investment in productive labor.  
11 That is a question of future race character, and not  
12 primarily an economic problem."

13           So, you know, this is the kind of thinking  
14 that the eugenicists were deploying as they were coming  
15 to develop the 1924 Act, the efforts to include Mexican  
16 immigrants on the quota system. And when that failed,  
17 you have the development of the 1929 law.

18           Q. So -- and when you talk about race and when you  
19 talk about racial animus, how are you conceptualizing  
20 race as opposed to nationhood?

21           So what is the -- so that was -- and that was the  
22 second part of my question.

23           And I'm sorry. I tend to ask compound questions  
24 and that's my problem.

25           A. Yeah. I appreciate simple questions. It's hard

1 to hold on to, like, multiple questions at a time. So,  
2 thank you for following up.

3 The concern, certainly during the 1920s, of  
4 Mexican immigrants was not about a national concern.  
5 The concern was about what was understood as non-white  
6 immigrants coming from south of the U.S./Mexico border.

7 The way in which Mexicans were constructed as  
8 racially undesirable, is that they were seen as being  
9 majority indigenous, part black, mixed race; that they'd  
10 be a threat to sort of the Nordic, particularly, of the  
11 1924 legislation.

12 You know, James Davis, who was really, you know,  
13 instrumental in the passage of the 1929 legislation. He  
14 was the Secretary of Labor and he worked very closely  
15 with (unintelligible), I think the record is quite  
16 clear was a ardent white supremacist.

17 James Davis commissioned a study in 1925 in  
18 response to the 1924 Act, and he wrote -- or in that  
19 study it's written, quote: "In blood, the people of  
20 the United States are mainly European and white. In  
21 blood, the people of Latin America and the West Indies  
22 are mainly Asiatic. And by that, they mean Indian or  
23 African. Mainly black or brown."

24 And it's that sort of notion about who is coming  
25 from south of the border being, quote, unquote, the

1 sort of (unintelligible) Indian migration of history,  
2 that makes Mexican immigrants seem racially unfit,  
3 undesirable to the white population of the United  
4 States.

5 Q. And thank you.

6 You know, one thing I think you touched on, I  
7 think, super briefly, was, um, there's a part of  
8 history -- I will admit I knew nothing about before  
9 this -- but sort of going into the 1920s, there were  
10 certain, uh -- I think they were called the Juarez Riots  
11 or the Bath Riots.

12 So there were -- there was this, sort of, system  
13 at the border, sort of, going into the 1920s that, as I  
14 understand it, people coming from south of the border  
15 were subjected to, but north weren't. And can you talk  
16 a little bit more about that, or can you elaborate a  
17 little bit more about that?

18 A. Sure.

19 I mean, there's a scholar Alexandra Minna Stern,  
20 who has written on this quite extensively on a the book  
21 -- the book she has on Eugenics and Immigration, and  
22 an article that she has on "Boundaries of Building and  
23 Blood." So, what happens is in 1917, U.S. Immigration  
24 Service institutes a new process by which they're going  
25 to quarantine and delouse all Mexican immigrants -- or

1 many Mexican immigrants crossing the U.S. and Mexico  
2 border, that delousing consisted of, really, a kerosene  
3 bath and a washing of the clothes, out of a fear that  
4 they were going to bring Typhus fever into the United  
5 States. There was an uprising against this system, and  
6 that's called the Juarez Riot, as you call it. And,  
7 yet, it continues through the 1920s, of the process of  
8 sort of cleansing Mexican immigrants as they're entering  
9 the United States.

10 People who had, sort of, border crossing cards  
11 had to subject to these -- were subjected to these  
12 weekly baths. And people who were crossing to, you  
13 know, go farther from the border were also subjected  
14 on their way in.

15 And it's my understanding, uh, that, you know,  
16 later on, some of the chemicals that were used in these  
17 baths would become chemicals that were used, um, in the  
18 genocidal campaigns in Nazi Germany.

19 Q. And specifically the gas -- and I -- are you  
20 referring to -- and I know I have it written down  
21 somewhere -- but are you referring to the gas  
22 specifically used in the gas chambers in Nazi Germany?

23 A. I'm forgetting the title of the gas, but, yes.

24 Q. Zyklon B. Pardon me. I had it written down  
25 here somewhere.

1           So, is that what you're referring to is the gas  
2 that was used in Nazi Germany?

3       A. I am. It just hurts so much to say that.

4           Uh, you know, Harry Laughlin, who was the  
5 eugenics expert brought into Congress by Howard Johnson  
6 in particular, uh, was heralded in Germany during the  
7 1930s for the immigration laws and, um, studies. And  
8 there's a terribly close relationship between the two  
9 regimes that developed.

10          Q. All right.

11           And I notice you are -- I will give you a  
12 moment because I, I didn't want to upset you with  
13 that question.

14           But -- and so when we talk about the use of  
15 this gas at the border, and the kerosene baths, um,  
16 in addition, were individuals at the southern border  
17 also required, including, you know, women and young  
18 girls, to strip naked for inspection?

19       A. That is correct.

20       Q. And was anybody at the northern border, to your  
21 understanding, ever subjected to this kind of, um,  
22 treatment?

23       A. No.

24           And, you know, the, the historical literature  
25 is clear on this that about 99 percent of the people

1 who came through Ellis Island were allowed passage into  
2 the United States, often with little more than, like,  
3 an eye exam for trachoma. And what was happening to  
4 immigrants, mainly at the El Paso border, because that's  
5 the main passage point on the southern border, and at  
6 Angel Island in San Francisco, which is the main passage  
7 point for Asian immigrants, were subjected to far  
8 different procedures of immigration control than in  
9 El Paso.

10 As you say, the delousing baths and the  
11 quarantine were particularly harmful, enraging,  
12 unhealthy to the point that, you know, they invited  
13 the riots of 1917.

14 Q. I believe there was a 17-year-old girl that  
15 incited those riots. Are you familiar with the name  
16 Carmelita Torres?

17 A. I know the case lightly.

18 Q. Well, then I won't make you go into it.

19 MS. GORMAN: And Your Honor, I would pass,  
20 um -- I guess, ultimately, before I let you go, is it  
21 your ultimate conclusion that racial animus was a strong  
22 motivating -- motivating force in the passage of illegal  
23 re-entry in 1929?

24 THE WITNESS: Yes. It is my professional  
25 opinion that racial animus was a motivating factor, a

1 significant motivating factor in the passage of the  
2 Immigration Act of March 4th of 1929.

3 MS. GORMAN: And is it your opinion that it  
4 continues to have a desperate impact on Latino or Latinx  
5 individuals?

6 THE WITNESS: It is my professional opinion  
7 that it was constructed to do just that, and that it  
8 continues to have a disparate impact. Yes.

9 MS. GORMAN: And are you aware of any  
10 period, since 1929, when illegal re-entry has not been  
11 on the books.

12 THE WITNESS: I am not aware of any such  
13 period.

14 MS. GORMAN: Your Honor, I will pass the  
15 witness.

16 MR. WALKINGSHAW: Thank you.

17 **RECROSS EXAMINATION**

18 BY MR. WALKINGSHAW:

19 Q. Professor Hernandez, this will be as brief as I  
20 can.

21 You testified on redirect that the opinion that  
22 you just voiced is, I believe you used the phrase  
23 "within the mainstream of immigration scholarship,"  
24 is that correct?

25 A. That racial animus was a driving factor in the

1       passage of immigration law, especially leading into  
2       1924, and then the concerns, post-1924, around Mexican  
3       immigration. Yes.

4       Q. So that opinion, you know, you testified is  
5       within the mainstream of immigration scholarship,  
6       correct?

7       A. Yes.

8       Q. And now you testified in a hearing in the  
9       District of Oregon last week, correct?

10      A. Correct.

11      Q. At that hearing, uh, did you not say that, "in  
12       the academy, you can always find differing opinions"?

13      A. I, I don't recall saying that. But, yes, I would  
14       affirm that today.

15      Q. It is true, correct?

16      A. Of course. Yes.

17      Q. Yeah.

18           Then, briefly, we discussed, on redirect, some  
19       differences between the enforcement at the Canadian  
20       border and enforcement at the Mexican border.

21           Did Canada have anything remotely like the  
22       Bracero program at any point in history?

23      A. No.

24      Q. Okay. The Bracero program permitted -- I believe  
25       you wrote in Migra -- two million Mexican laborers to

1 work illegally in the United States under the auspices  
2 of the program, correct?

3 A. Yes. It also included West Indian laborers.

4 There's a strong sense of wanting to have, again,  
5 non-white, racially marginalized populations included in  
6 this workforce. So, it wouldn't have been something  
7 constituted for a majority white Canadian population.

8 The other distinction for the Canadian border  
9 that's important is that under treaty rights, indigenous  
10 folks, moving across the Canadian border, have free  
11 passage.

12 Q. All right.

13 And then just very briefly, I'd just like to make  
14 sure I get some dates correctly.

15 I believe you said the Juarez Riot took place in  
16 1917, is that correct?

17 A. Uh-huh.

18 Q. And the quotes that you wrote from the -- I'm  
19 forgetting the term -- but the Eugenics Committee -- on  
20 redirect, do you know the quotes I'm referring to?

21 A. Yes.

22 Q. Those are from 1920s, correct?

23 A. Yes. That's correct.

24 Q. Okay.

25 MR. WALKINGSHAW: Nothing further --

1 THE WITNESS: -- the 1924 Act.

2 MR. WALKINGSHAW: Nothing further. Thank  
3 you.

4 MS. GORMAN: Your Honor --

5 **FURTHER REDIRECT EXAMINATION**

6 BY MS. GORMAN:

7 Q. Professor Hernandez, and I'll be brief because I  
8 know I want to touch on this with Professor Gonzalez  
9 O'Brien too, but in terms of the Bracero program, was  
10 there -- can you talk to me about race and exploitation  
11 in terms of that program; or, is that beyond the scope  
12 of your -- I don't want to put you in a position where  
13 you're talking, you know, where I'm asking you to talk  
14 beyond the scope of your, you know, your specialization  
15 or expertise. So, feel free to turn me down.

16 A. No. That's fine. I think, as Mr. Walkingshaw  
17 has indicated, my book Migra, I spent a considerable  
18 amount of time on the Bracero program.

19 So, first of all, you know, as I think I had just  
20 mentioned, the fact that the bilateral agreements that  
21 become known as the Bracero program are only effectuated  
22 between the United States and Mexico and West Indian  
23 countries, is one indication that there was a desire  
24 to find a -- not just close, but a certain type of  
25 population to come in and do this temporary labor.

1 So, non-white populations were targeted for these  
2 agreements, and that was Mexico and the West Indies  
3 in particular. And so I think that that's one of the  
4 key indicators of the dynamics at play, that it's not  
5 just labor, it's a racialized labor form that people  
6 wanted to have through the Bracero program.

7 You also have, just through the implementation  
8 of the program -- you know, especially in Texas, but  
9 elsewhere -- this constant struggle over how Mexican  
10 Braceros are going to be treated in the communities.  
11 Are they going to be given access to restaurants?  
12 Are they going to be given access to dances? And  
13 pretty consistently, uh, they are subject to, uh,  
14 Juan Crow. And that becomes a real sticking point  
15 in the relationship, the bilateral relationship, to  
16 the point that, you know, that Texas is largely kicked  
17 out of the program.

18 Q. In terms of -- and in terms of the Bracero  
19 program, you have talked, sort of, briefly, about the,  
20 I guess what we would call delousing or the gassing that  
21 had happened at the border going into the 1920s. But,  
22 are you aware of the Braceros being -- and this would  
23 be a different chemical. It would be DDT -- but sort of  
24 being subjected to very similar nude inspections, um,  
25 sort of being gassed with DDT during that process,

1       when they were, uh, brought to American, I guess,  
2       agricultural industries?

3           A. Yes. The Bracero workers were gassed  
4       systematically with DDT, and there's, you know, many  
5       photos and studies on that process.

6           Q. And subjected, also, to these nude and invasive  
7       inspections?

8           A. That is correct.

9           Q. And when -- you know one of the, I guess,  
10      more arresting images I've come across in the Bracero  
11      was, sort of, inspections by agricultural, I guess, land  
12      owners or farm owners, uh -- but Braceros, when they  
13      were brought in to be used as migrant labor force,  
14      was there -- were they able to, sort of, be picked for,  
15      I guess, physical fitness, or the ability to toil well,  
16      by American agricultural interests?

17           A. Um, well, so that's certainly true. There have  
18      long been a stereotype at play that Mexican workers, as  
19      a race, right, were fit for agricultural labor because  
20      they were, I think, believed and thought, you know,  
21      shorter to the ground and ready for stoop labor.

22           So, there's sort of a racialized (unintelligible)  
23      of people's appearance to do this kind of work. And,  
24      you know, it's part of the reason -- you know, one of  
25      the little trowels that Braceros were given to work

1 with, which forced them to sort of bend over constantly,  
2 really, literally, broke backs, and became a really  
3 important issue that people organized around.

4 You know, a lot of the reasons they were  
5 given those trowels was the stereotype that they, as  
6 a racial group, um, were more stout and close to the  
7 ground and sort of fit for this kind of labor, and so  
8 they didn't need the accoutrement that others did.

9 Q. So -- and in terms of the Braceros, I guess  
10 what little protections were afforded to them on paper,  
11 did they -- were they generally violated by industry?

12 A. Oh, I mean, that's where Operation Wetback  
13 comes from in 1954, is the persistent violation of  
14 the Bracero contracts. In many ways, that's a campaign  
15 that is simultaneously anti-Mexican, and meant to bend  
16 employers to comply.

17 Q. In your general opinion, were Braceros an  
18 exploited labor force and racialized?

19 A. Absolutely.

20 MS. GORMAN: Your Honor, I think at this  
21 point I would pass the witness. I am worried about  
22 going into too much overlap with Dr. Gonzalez O'Brien.

23 And Professor Lytle Hernandez has been  
24 very generous with her time already, so I'll pass  
25 the witness.

1                   THE COURT: Mr. Walkingshaw, do you have any  
2 additional questions based on the re-redirect?

3                   MR. WALKINGSHAW: No, Your Honor. Thank  
4 you.

5                   THE COURT: All right. Thank you.

6                   Thank you, Professor Lytle Hernandez, for  
7 your time here this morning.

8                   THE WITNESS: Thank you for having me.

9                   THE COURT: Let's take a brief recess before  
10 we resume with the next expert witness.

11                  THE CLERK: Yes, Your Honor.

12                  THE COURT: We'll take about 15 minutes.

13                  MR. WALKINGSHAW: Beg your pardon, Your  
14 Honor, how long should we -- I might excuse myself from  
15 the room.

16                  THE COURT: We'll take a 15-minute recess.

17                  MR. WALKINGSHAW: All right. Thank you,  
18 Your Honor.

19                  (Recess taken.)

20                  THE CLERK: Court is back in session.

21                  THE COURT: All right. Ms. Gorman, let's  
22 resume with the defense's next witness.

23                  MS. GORMAN: Your Honor, we call Professor  
24 Gonzalez O'Brien.

25 \\\

1                           **BENJAMIN GONZALEZ O'BRIEN,**  
2                           called as a witness on behalf of the Defendant,  
3                           was sworn and testified as follows:  
4

5                           THE CLERK: Thank you.

6                           Please state for the record your full name  
7                           and spell both your first name and your last names.

8                           THE WITNESS: Benjamin Gonzalez O'Brien.

9                           Last names G-o-n-z-a-l-e-z; O, apostrophe, B-r-i-e-n.

10                          First name, B-e-n-j-a-m-i-n.

11                          MS. GORMAN: May I, Your Honor?

12                          THE COURT: Yes.

13                          MS. GORMAN: Thank you.

14                          **DIRECT EXAMINATION**

15                          BY MS. GORMAN:

16                          Q. Professor Gonzalez O'Brien, can you introduce  
17                          yourself to the Court, and explain a little bit about  
18                          your employment and your occupational background?

19                          A. Certainly. I'm an Associate Professor of  
20                          Political Science at San Diego State University. I'm  
21                          also the author of two books on U.S. immigration policy,  
22                          Handcuffs and Chain Link, Criminalizing the Undocumented  
23                          in America. That came out in 2018, with the University  
24                          Virginia Press. And also, Sanctuary Cities. The  
25                          Policies of Refuge, that came out in 2019, with Oxford  
                        University Press.

1           In addition to the two books that I have, uh,  
2 I've also -- I'm also the author of a number of articles  
3 that have been published in a range of journals.

4       Q. Can you describe how you developed an expertise,  
5 in particular in this area that we are talking about  
6 today, in criminalization and migration?

7       A. So my expertise is based on a reading of  
8 committee reports, as well as congressional debate  
9 over different pieces of immigration legislation,  
10 including the 1929 Undesirable Aliens Act; the 1924  
11 Johnson-Reed Act; the 1986 Immigration Reform and  
12 Control Act; and the 1996 Illegal Immigration Reform  
13 and Immigrant Responsibility Act.

14           I also do some quantitative work looking at  
15 stereotypes of undocumented immigrants. That was part  
16 of my first book. And also some quantitative work,  
17 looking at things like crime rates in sanctuary and  
18 non-sanctuary cities, which is part of that second.

19       Q. And Professor, can you also talk about how, as  
20 a political scientist, you sort of conceptualize or  
21 understand history in your work. Because I know there's  
22 a distinction between the historian and a political  
23 scientist, so I'm trying to, sort of, tease that out  
24 because they're connected.

25       A. Right.

1           So, you know, one of the connections that I draw  
2 in my first book between the Undesirable Aliens Act  
3 and the later Illegal Immigration Reform and Immigrant  
4 Responsibility Act, is that -- is the influence of  
5 initial decision -- policy-making decisions on future  
6 choices, as well as, uh, how policy decisions at one  
7 point in time, or policies themselves at one point  
8 in time, can change how groups are characterized, can  
9 change how groups are discussed; and how that, in  
10 turn, influences future congressional debates, future  
11 congressional decisions on policy in that area.

12          Q. And is your work on these topics based on  
13 principles and methodologies generally deemed reliable  
14 in the field of political science?

15          A. Yes. Both of my books were peer reviewed by  
16 both presses, and all of my articles, to date, have  
17 been peer reviewed. Sometimes multiple times.

18          Q. And in your work, do you also -- do you  
19 collaborate with other, sort of, notable academics on  
20 these topics about immigration history and policy?

21          A. Yeah. I've collaborated with a number of other  
22 academics at different institutions. Uh, researchers  
23 at the University of New Mexico; University of Oklahoma;  
24 University of Washington, Tacoma; and then some work  
25 in the past with, with a researcher at UCLA.

1       Q. And I skipped over this, and I know you're a  
2 professor, but just to be clear for the record, you  
3 have a Ph.D in Political Science, is that correct?

4       A. I do. Not only a Ph.D, but also two master's  
5 degrees.

6       Q. Well, thank you.

7                   MS. GORMAN: And, Your Honor, I would ask  
8 that the Court recognize Professor Gonzalez O'Brien as  
9 an expert in political science, and particularly with  
10 a focus on, um -- his words are going to be way better  
11 than mine -- but on the intersection between criminal  
12 law and immigration and policy, if -- unless Professor  
13 Gonzalez O'Brien has a different characterization that  
14 would be better.

15                  THE WITNESS: Um, I think the way that I  
16 would characterize it would be between past policy  
17 decisions and future policy choices when it comes to  
18 law-making in Congress.

19                  MS. GORMAN: Your Honor -- and Your Honor, I  
20 guess with that, would the Court --

21                  THE WITNESS: I see a wrinkled brow.

22                  THE COURT: I'm sorry. So the request is  
23 to recognize Professor Gonzalez O'Brien as an expert  
24 in political science, with a focus on the intersection  
25 between past policy decisions and its impact on future

1 choices and debate when it comes to legislation?

2 THE WITNESS: If I may clarify, Your Honor.

3 I think political science, with expertise  
4 in immigration policy, race, and public policy would  
5 probably be a more accurate characterization of my  
6 areas of expertise.

7 THE COURT: All right.

8 Does the government have any objection?

9 MR. WALKINGSHAW: Not -- beg your pardon,  
10 Your Honor. I'm having some microphone difficulties.

11 Can you hear me?

12 THE COURT: Yes.

13 THE WITNESS: Yes.

14 MR. WALKINGSHAW: Apologies.

15 No objection to the expertise framed as it  
16 was in that last instance.

17 THE COURT: So the request is for the Court  
18 to recognize Professor Gonzalez O'Brien as an expert  
19 in political science, with a particular expertise in  
20 immigration policy, race, and public policy.

21 Is that correct?

22 MS. GORMAN: That sounds right to me,  
23 Your Honor.

24 THE COURT: All right. The request is  
25 granted.

1 MR. WALKINGSHAW: Um, yeah, I'm fine with  
2 that, Your Honor. Thank you.

3 THE COURT: All right. The request is  
4 granted and the Court will so certify.

5 BY MS. GORMAN:

6 Q. So, Professor Gonzalez O'Brien, I don't want  
7 to be -- I'll try not to be duplicative, but -- and  
8 I wouldn't fault you if you didn't -- but were you  
9 present and were you able to listen to Professor Lytle  
10 Hernandez's testimony that she just provided to the  
11 Court?

12 A. I was both present and over-caffinated.

13 Q. Great. Me too.

14 So, Professor O'Brien, I guess I want to ask,  
15 sort of, generally, you know, do you agree with,  
16 uh, Professor Lytle Hernandez's characterizations,  
17 particularly with reference to the historical and  
18 legislative record that culminated in the 1929  
19 Undesirable Aliens Act?

20 A. I do.

21 Q. And to the best of your knowledge, is 1939  
22 the first criminalization of illegal re-entry in the  
23 United States?

24 A. 1929, but --

25 Q. Oh. Sorry. I don't know what I said.

1           So since 1929, has there ever been a time that  
2 illegal re-entry was not on the books?

3       A. No.

4       Q. Okay.

5           So, Professor Gonzalez O'Brien, I wanted to try  
6 to, as much as possible, provide a bridge between both  
7 1929, and the events leading up to it, and 1952. So I  
8 want to start, I guess, so that I don't ask a million  
9 questions in one question, would something that happened  
10 after 1929 -- just to trace its, sort of, historical  
11 origin -- but, is it your understanding that starting  
12 at about the Great Depression era, there was what we  
13 call, or what is called, sort of, the re-patronization  
14 of Mexican people to Mexico and the United States during  
15 the Great Depression?

16      A. Yes.

17      Q. Tell me what that is.

18      A. So, the 1920s was a period of increasing  
19 immigration restriction. I don't want to retread  
20 over a lot of the things that Dr. Lytle Hernandez has  
21 already covered, but the passage of the Johnson-Reed,  
22 the discussion over quotas being placed on Mexico in  
23 the period between Johnson-Reed and the passage of the  
24 Undesirable Aliens Act in 1929, and then in the period  
25 following -- well, in the period -- in the same year as

1 the passage of the Undesirable Aliens Act, you also do  
2 have the beginning of a program that's been referenced  
3 as Mexican re-patronization, which was this push, as  
4 the U.S. headed into the Great Depression, this push  
5 to get Mexican immigrants to repatriate to Mexico. And,  
6 it was relatively successful. The numbers vary in  
7 terms of the number of immigrants -- or the number of  
8 Mexicans -- let me clarify that -- the number of  
9 Mexicans who left the United States, with, kind of,  
10 the lowest estimates being around 400,000, and some of  
11 the higher estimates being well over a million who  
12 left for Mexico. And some of the estimates of that  
13 is, you know, that around 60 percent of those who  
14 left -- who went back to the Mexico or went to Mexico  
15 were, in fact, American citizens.

16 Now, there's a question of, well, why are  
17 Mexican -- if they're American citizens, why are they  
18 returning to Mexico?

19 And I think that part of the story here is that  
20 this was a campaign that was meant to fuel voluntary  
21 re-patronization. But, that voluntary re-patronization  
22 was, in some cases, driven by a sense of the threat of  
23 deportation or the threat of additional penalties if  
24 those individuals did not return to Mexico. And in  
25 particular, there was -- there were a number of raids

1       in Los Angeles. And along with those raids, there was  
2       publicity released announcing the raids in advance; that  
3       there would be arrests; and that these raids were coming  
4       to the area; and that, uh -- this idea that this would  
5       create kind of a psychological push to get people to  
6       leave for Mexico.

7           And the majority of the people who are questioned  
8       during these raids are, uh, are Mexicans. A raid in  
9       the El Monte area on February 13th, questioned about  
10      300 people. Only 13 were arrested. But, 12 of the 13  
11      were Mexicans.

12           So you have this period of the Great Depression  
13       where, in part, because of concerns about employment,  
14       you have this push to force Mexicans out of the United  
15       States and out of competition with American laborers.  
16       And this runs, roughly, from 1929 to 1936. And on the  
17       heels of this, though, you have this, this change in  
18       labor demands as the United States emerges from the  
19       Great Depression. And as this -- you have this change  
20       in labor demands. And as Dr. Lytle Hernandez has  
21       already covered, you have the beginning of the Bracero  
22       program.

23           The Bracero program, I don't want to retread  
24       the ground that Dr. Lytle Hernandez covered, but what  
25       I would like to talk about a little bit is the parallel

1 growth in the term of the undocumented population  
2 and also the characterization of that population as  
3 "wetbacks." And that term "wetback" is one that is  
4 racially derogatory, was recognized as being racially  
5 derogatory at the time, and has roots that link back to  
6 some of the discussions around both the quotas being  
7 applied to Mexico, of discussions and debate of the  
8 Undesirable Aliens Act.

9 And this term "wetback" is referenced in a number  
10 of pieces of legislation at the time, including a Senate  
11 Bill 1851 -- well, also known as the, uh, Act of March  
12 20th, 1952, which is referenced in the Congressional  
13 Record as the Wetback Bill. And this was an empty  
14 harboring Bill, but regularly referred to Mexicans as  
15 wetbacks.

16 And the term with "wetback" comes from the idea  
17 that individuals who are entering without inspection  
18 have to do so at an area where there is no bridge  
19 over the Rio Grande River and, therefore, they get wet  
20 and, therefore, the term wetback.

21 But across the period of the 1940s and 1950s,  
22 this term has -- is associated, and almost synonymous  
23 with Mexicans. And in addition to being synonymous with  
24 Mexicans and racialized in much the same way, it also  
25 has the attribution of a lot of the negative stereotypes

1 that were associated with Mexican immigrants in the  
2 push, or quotas to be applied to immigration from Mexico  
3 and south of the Rio Grande, as well as during debate  
4 over the Undesirable Aliens Act.

5 So, I would like to talk a little bit about  
6 that, unless you have -- unless you have any additional  
7 questions or would like to redirect me.

8 Q. One thing that struck me, because, you know, the  
9 focus, I think, is on racial animus and the construction  
10 of race, was -- I mean, one thing that you mentioned,  
11 but sort of glossed over, was that during the Great  
12 Depression, when you see this, I guess, competition  
13 between, I guess, what's seen as American potential  
14 employees and immigrant employees, this re-patronization  
15 drive is not -- is targeting 60 percent of Mexican  
16 Americans as in United States citizens, so how, sort  
17 of, being Mexican becomes then associated with being in  
18 competition with, quote, Americans, even though these  
19 are Americans?

20 A. Well, you know, Mexicans during this time -- and  
21 Mexicans today, really, are, in the words of Mae Ngai,  
22 the iconic illegal aliens. So when you're making  
23 this push for re-patronization, the idea is that a lot  
24 of the -- you know, that anybody who is Mexican is also,  
25 potentially, an illegal immigrant, or is someone who is

1 here competing with American workers for jobs and  
2 working for lower wages, and a lot of that baggage  
3 that goes hand-in-hand with that characterization of  
4 the illegal work -- of the illegal immigrant.

5 And so the targeting during this period is  
6 broadly aimed at Mexicans. And, you know, most of  
7 the -- most of the writing that I'd seen describing  
8 some of those raids in L.A., the individuals who are  
9 being questioned are individuals of Mexican descent.  
10 And this is regardless of whether their American  
11 citizens, or Mexican nationals who are here legally,  
12 or illegal Mexican entrants. They are being questioned  
13 because they are being identified as, uh, potential --  
14 of having potential illegality. Illegality. And  
15 that is something that becomes attached to the, kind  
16 of, racial identification of Americans under the  
17 Undesirable Aliens Act, is this potential identification  
18 of criminality, or this ascribing of a criminal identity  
19 that is very much linked to a Mexican identity.

20 Now, there are distinctions that can be drawn,  
21 right, between those who are here illegally or Mexican  
22 Americans but, broadly speaking, if you are trying to  
23 identify someone who could be an undocumented immigrant.  
24 And we see this in some of the debates around Bills,  
25 like, Arizona's SB-1070, and the question of if you are

1 saying that police officers can ask people who they  
2 suspect of being an undocumented immigrant, they can  
3 ask them for additional documentation.

4 Well, the problem is that that raises the  
5 question of racial profiling because we know that in  
6 this country, uh, being an illegal immigrant is also  
7 seen as a racially -- it's seen as racially coded, as  
8 being someone who is, uh -- appears to be a Latino.

9 Q. So the term "wetback," even though it describes  
10 people who have to cross via, uh, you know, non-ports  
11 of entry, would apply to sort of, generally, to Latinos  
12 or to Mexicans?

13 A. Yeah, it would. And there was a study, um,  
14 titled the -- a 1951 study titled, "The Wetback In  
15 the Lower Rio Grande Valley." And in this study, what  
16 the authors found is, and I quote: "There are no  
17 careful" -- "no careful distinctions are made between  
18 illegal aliens and local citizens of Mexican descent.  
19 They are lumped together as Mexicans. And the  
20 characteristics that are observed among the wetbacks  
21 are, by extension, assigned to local people." Again  
22 saying that this term -- the illegality, this term  
23 "wetback," and all the racial baggage that goes with  
24 it, is ascribed broadly to anyone who could be seen as  
25 being of Mexican descent.

1       Q. So when you're talking about Mexican  
2 re-patronization during the Great Depression -- I  
3 didn't mean to cut you off, but then you had also sort  
4 of transitioned and talked about the Bracero program.  
5 And I think it's important, particularly, because these  
6 are two events that sort of bridge 1929, and then the  
7 codification in 1952.

8           So I didn't mean to cut you off, but following  
9 this, I guess -- I want -- it's not re-patronization, I  
10 guess, to the extent that 60 percent were U.S. citizens,  
11 and I'll refer to it, for ease of reference, as  
12 re-patronization. But then can you sort of go back  
13 to talking about what the Braceros program was, and,  
14 sort of, the ways that it sort of changed the debate  
15 around Mexicans and Mexican Americans and Latinos in  
16 general?

17          A. Sure.

18           One of the things that happens with the Bracero  
19 program -- and Dr. Lytle Hernandez already covered some  
20 of this in her testimony, so I won't restate of all of  
21 it -- but one of the things that happens alongside the  
22 Bracero program is this (unintelligible) undocumented  
23 population. And that occurs for a number of reasons.  
24 That occurs, again, because of some of the things that  
25 had to be endured by individuals who wanted to be

1 Braceros. It also is linked to the -- there being  
2 more demand for spots in the Bracero program than there  
3 were actual spots available. And, it also goes to the  
4 process that Braceros had to pursue, as well as the  
5 process that some of the employers had to pursue. And  
6 employers, particularly those in border regions and in  
7 border areas, oftentimes saw it easier just to recruit  
8 an undocumented immigrant, than go through the red tape  
9 of the Bracero program.

10 And so alongside the growth of the Bracero  
11 program and the implementation of the Bracero program,  
12 you also have -- you also have an increase and a growth  
13 in the size of the undocumented population, and the  
14 number of the undocumented entrants that is occurring  
15 alongside this, and is also, um, sometimes seen as a  
16 consequence of the Bracero program itself; that this  
17 is acting as a -- this is spurring undocumented  
18 immigration in some ways. Both because there is  
19 greater discussion of, you know, there are jobs  
20 available, but also because of some of the conditions  
21 under the Bracero program, which -- you know, it's a  
22 bilateral agreement -- although as Dr. Lytle Hernandez  
23 points out, Mexico is a -- or a trilateral agreement.  
24 Excuse me -- although Mexico was a junior partner in  
25 this. And many of the protections that were supposed

1 to be in place for Mexican workers simply weren't  
2 there.

3 And you know, of -- in 1956, there were 1631  
4 employers who violated the program in some way, only  
5 50 of those were removed from the (unintelligible) of  
6 having future access to Bracero workers.

7 So alongside this, kind of, legal employment  
8 program, you have the growth of the undocumented  
9 population, and you also have increasing discussion of  
10 the quote, unquote, wetback problem. And this harkens  
11 back, in many ways, to -- the discussion of wetbacks  
12 harkens back, in many ways, to the racialized discussion  
13 of Mexicans in the period following the passage of  
14 Johnson-Reed, so in the discussion of quotas, but also  
15 in the debate around the Undesirable Aliens Act.

16 So during the debate around the Undesirable  
17 Aliens Act -- there we go. Sometimes these names for  
18 legislation are tongue twisters, especially if you say  
19 them multiple times -- but, John Box of Texas, noted  
20 that they are badly infected with tuberculosis and other  
21 diseases. There are many paupers among them. There  
22 are many criminals. They work for lower wages. They  
23 are as objectionable as immigrants when tried by the  
24 tests applied to other aliens.

25 Representative Green of Florida noted that the

1 (unintelligible) examine the criminal records, you  
2 will find that the percentage of criminals is largely  
3 foreign.

4 These were all attributions of criminality that  
5 we know oftentimes -- that we know go hand-in-hand with  
6 notions of racial superiority and inferiority. And this  
7 was part a big part of the debate around eugenics during  
8 this period of the 1920s.

9 And this idea about one of the reason -- one of  
10 the things that was inherent in racial inferiority was,  
11 kind of, feeble-mindedness, a lack of impulse control  
12 and, therefore, a greater tendency towards criminal  
13 behavior.

14 So, we see this in the debate around the  
15 Undesirable Aliens Act in 1929. And then moving forward  
16 and talking about the wetback problem, a 1956 paper  
17 references a joint study by the GI form in Texas and  
18 the Texas Federation of Labor. And the question was  
19 to look at the problem of undocumented entry and the  
20 problem of wetbacks. And they said that you could  
21 divide wetbacks into two different groups. And again,  
22 these have a lot racialized traits ascribed to them.

23 So, one group was a docile group of agricultural  
24 workers, who have accepted good or bad treatment,  
25 starvation wages, diarrhea and other sicknesses for

1 his children, and unsanitary living conditions. These  
2 were individuals who came here, who were brought here  
3 to work.

4 But then there's also a distinction that you  
5 made between those individuals and the Chucos, who  
6 were portrayed as criminals, the marijuana peddlers,  
7 the users -- and users, the falsifiers of identity  
8 documents, the smugglers, the prostitutes, and the  
9 homosexuals.

10 So, you have this attribution to the term  
11 wetback. Of these racialized traits, of criminality, of  
12 submissiveness, that trace back both to the discussion  
13 around eugenics in the 1920s, but also trace back to  
14 the general discussions around racial identities that  
15 we see in that early part of the 20th century.

16 In 1952, prior to the passage of the  
17 McCarran-Walter Act, you have a Bill that is introduced  
18 and passed on March 20th that is nicknamed the  
19 Wetback Bill. And this is a piece of anti-harboring  
20 legislature where, throughout the debate, Mexican  
21 undocumented entrants are regularly referenced as  
22 wetbacks. And Senator McFarland, during the debate  
23 over the Act of March 20th, 1952, notes that Senate  
24 Bill 1851, a Bill known as the Wetback Bill, was going  
25 to be debated. Initially, this legislation was aimed

1 strictly at Mexicans. It referenced Mexicans.

2 Now this was struck from -- or this was  
3 struck from the Bill because Senator Aiken of  
4 Vermont, questioned whether you could discriminate,  
5 constitutionally, against the aliens of one  
6 particular nation. And he also noted that while  
7 he felt it needed to apply to all aliens, that he  
8 knew of no instances of the illegal employment of  
9 Canadians. And that, certainly, this isn't common.

10 And, again, we have this dual construction of  
11 the two borders. The construction of one border as,  
12 kind of, a racialized threat to the nation. The  
13 construction of Mexican immigrants in 1920. But then  
14 by the 1950s, undocumented entrance, or wetbacks, as  
15 criminal threats to the nation. But then, on the other  
16 hand, this construction of Canadians as individuals who  
17 could be assimilated, individuals, ho posed no threat.  
18 And that goes back to early debates, immigration  
19 restriction league noted early on in the 1920s, that  
20 we didn't need to worry about Canadians because,  
21 racially, they're the same as Americans, and quotas  
22 really needed to be applied to Mexico and other  
23 countries of North and South America, because these  
24 were the, kind of, mongrelized people that we didn't  
25 want diluting the, kind of, Anglo bloodline in the

1       United States.

2           And so the debate around wetbacks is -- also  
3 enters into the McCarran-Walter Act. And with  
4 McCarran-Walter, you don't have a lot of debate around  
5 the recodification of 1326, right, that's initially  
6 passed in 19 -- that initially becomes part of U.S.  
7 law in 1929. You don't have a lot of debate around  
8 1326 in McCarran-Walter. But what you do have is  
9 that you do have this note that's entered in the  
10 support for 1326 by the Department of Justice, and  
11 it's a letter from the Deputy Attorney General,  
12 Peyton Ford. And in this letter, he specifically  
13 notes that: "Statutory clarification on the above  
14 points will aid in taking action against the conveyors  
15 and receivers of the wetback."

16           So, again, you have the use of this racialized  
17 term to describe Mexican immigrants, even though you  
18 don't have debate around Mexican immigration in the  
19 McCarran-Walter Act itself, or during debate for the  
20 McCarran-Walter Act, in part, because you have this  
21 Bill that precedes it by two months, where much of  
22 the debate is how do we limit the number of Mexican  
23 immigrants and the trafficking of undocumented Mexican  
24 immigrants into the United States? And that Bill  
25 also contained the Texas proviso, which gave workers

1       the kind of loophole of, you know, if you're employing  
2       undocumented laborers, it doesn't constitute harboring.

3           Q. Now, when we're talking about -- so we're  
4       talking about the, sort of, Wetback Bill in the  
5       context of the McCarran-Walter -- I know, that various  
6       (unintelligible), sort of, commented on the lack of,  
7       sort of, deep discussion about 1326. Um, is that --  
8       but still in the Walter -- the McCarran-Walter Bill, do  
9       you have the -- so it seems like you have the term in  
10      this -- even in the Congressional Record, they're using  
11      this, sort of, racial slur of "wetback."

12           Is that fair?

13           A. That is fair. Yes.

14           Q. And then in this, sort of, the legislation -- the  
15      Wetback Bill that passes, I guess three months earlier,  
16      you have this exemption of employers from those who  
17      are, quote, harboring aliens.

18           Is that a fair characterization?

19           A. That is.

20           Q. So can you talk about -- so these are, sort  
21      of the, sort of historical -- so, I guess is it a  
22      fair characterization to sort of encompass both  
23      the historical link between 1929 and the 1952  
24      codification. Was there also reference in the  
25      legislative history of an explicit desire to carry

1 forward the 1929 Act? Of course, making it more  
2 easy to, to, um, establish venue, as you had discussed  
3 before?

4 A. Right. That was part of Peyton -- a part of  
5 Peyton Ford's letter, that this needed -- that this  
6 should be carried forward. But, it didn't receive any  
7 debate during the, kind of, longer debate over the  
8 McCarran-Walter Act, which was largely dedicated to a  
9 question of the, uh, the revision of the quota system,  
10 and some of the issues inherent in the McCarran-Walter  
11 Act itself, and some of the racialized aspects, right,  
12 that didn't have to do with Mexican immigrants, but did  
13 have to do with the assigning of quotas to the age of  
14 specific triangle.

15 Q. In terms of the, sort of the addition to the  
16 1929 legislation, is it your understanding that 1326  
17 was also expanded so that -- I guess, in their words,  
18 "wetbacks could be prosecuted with venue in any  
19 jurisdiction where they existed"?

20 A. Right.

21 Q. So that they would not be limited to having --  
22 to the jurisdiction where they re-entered, but rather  
23 any place that you are living or existing in the United  
24 States who are then, at that moment, subject to criminal  
25 prosecution wherever you're found?

1       A. That's correct. And, again, there was no -- you  
2 know, there was no substantial debate, or there was  
3 no debate over the problematic way in which the original  
4 codification of 1326 occurred in 1929. This received  
5 no attention in 1952, despite the fact that you do have  
6 a relatively robust debate around the problematic, uh,  
7 implementation, and the problematic aspects of the  
8 Johnson-Reed Act that's passed in 1924. But, yet,  
9 Mexican immigration receives almost no attention.

10           And, again, if you go back three months, Mexican  
11 immigration is now talked about in terms of the -- in  
12 terms of wetbacks. Instead of talking about this in  
13 the very overtly racialized terms of the Undesirable  
14 Aliens Act in 1929, where you have discussions of  
15 the, kind of, mongrel -- mongrelized blood of Mexicans,  
16 but this changes to now you're talking about wetbacks.

17           So you're sidestepping a little bit about talking  
18 about racial purity, but you're assigning those, and  
19 you're ascribing those same traits now to these  
20 individuals that you're characterizing as wetbacks,  
21 individuals who are not distinguishable in any way,  
22 shape, or form from individuals of Mexican origin, or  
23 people who look as if they could be individuals of  
24 Mexican origin.

25           Q. Now we talk about the -- so, I guess, is it fair

1 to say that there was an understanding of the 1920s  
2 history of the legislation when we're going forward in  
3 1952?

4 A. There was. And there was an understanding  
5 of the problematic attributions of criminality to  
6 Mexican immigrants. The Wickersham Commission, just  
7 together in 1929 by Herbert Hoover, to study the  
8 question of the impact that immigrations had on the  
9 United States, had an entire volume of their final  
10 report, which was released in 1931, on criminality in  
11 the foreign born. And a substantial number of pages  
12 of that was dedicated to the question of Mexican  
13 criminality. And, you know, with the -- because these  
14 attributions had been made, there was this idea that  
15 there was something about certain national groups  
16 or certain races that made them predisposed towards  
17 criminal behavior.

18 And over, I think it's around -- it's well  
19 over 100 pages is dedicated to the, kind of, Mexican  
20 question. And they didn't find any support for this  
21 in 1931, right? And they say, well, you know, in some  
22 areas Mexican immigrants offend at a higher rate, and  
23 in some areas they offend at a lower rate. And some  
24 specific studies, so the study of the State of Texas,  
25 finds no relationship there. And yet, by the time you

1 move forward to the 1950s, you still have these  
2 attributions of criminality. Now you're talking about  
3 wetbacks instead of Mexicans, but as the term was  
4 understood, this was a racialized term that applied  
5 to all individuals who looked as if they could be of  
6 Mexican descent. And going back to that comment I  
7 mentioned earlier in that 1951 study of the wetback  
8 in the lower Rio Grande, that this was broadly an  
9 attribution of all of these negative stereotypes that  
10 were made to the wetback, to all individuals of Mexican  
11 descent or nationality.

12 Q. Is there any --

13 THE COURT: I'm sorry. Ms. Gorman --

14 MS. GORMAN: Pardon me.

15 THE COURT: -- if I may interject.

16 I'm trying to understand because  
17 Dr. Gonzalez O'Brien just testified that there was an  
18 understanding of the -- and I'm -- I hope I'm quoting  
19 right -- the problematic criminalization on Mexican  
20 immigrants when the statute 1326 was codified in 1952.

21 Is that a fair statement of what your  
22 opinion is?

23 THE WITNESS: Yes. There was a governmental  
24 commission report from 1931, that looked at the question  
25 of Mexican criminality, and found no relationship to --

1       between Mexican nationality or race and criminal  
2       behavior.

3                  MS. GORMAN: And just, Professor Gonzalez --

4                  THE COURT: No, but --

5                  MS. GORMAN: Oh. Sorry.

6                  THE COURT: I'm sorry. I'm still trying  
7       to understand.

8                  When you said there was a general  
9       understanding of this -- the problem of criminalizing  
10      Mexican immigrants, in the discussion -- well, from -- I  
11      thought what you meant was when the statute was codified  
12      in 1952, there was that general understanding of that  
13      aspect. And I -- and so if I'm wrong, let me know  
14      if I'm wrong. If I'm correct, then I want to know  
15      what evidence is there to show that there was such an  
16      understanding.

17                 THE WITNESS: Well, the evidence -- I  
18      mean, the evidence is that you have, you know, a  
19      governmental report released in 1931, and one that  
20      wasn't, you know -- I would expect wouldn't be unknown  
21      to members of Congress serving on the Immigration and  
22      Naturalization Committee, or to members of Congress  
23      more broadly. I mean, it is the duty of Congress to  
24      be aware of, especially relatively significant reports.  
25      I mean, this was the second large-scale study after

1       the Dillingham Commission in the earlier part of the  
2       20th century. This was the second big examination of  
3       the impact of the immigration on the United States, as  
4       well as the first to specifically look at the question  
5       of immigrant criminality.

6       BY MS. GORMAN:

7           Q. But to be clear, Professor Gonzalez -- and  
8       I think maybe -- and maybe I'm misunderstanding  
9       Chief Judge Du's question -- I think the question  
10      went to was the association of criminality with  
11      wetbacks, in spite of the fact that there was empirical  
12      evidence of no criminality, or was it understood  
13      that it was problematic to associate wetbacks with  
14      criminality?

15           And Chief Judge Du, am I understanding the  
16      distinction correctly of your question?

17           THE COURT: I think that -- well, based  
18      on Professor Gonzalez O'Brien's answer, I think I  
19      misunderstood his earlier testimony. I think what  
20      he meant to say is that by the time of the 1952  
21      codification, there was a clear understanding there  
22      was no connection between Mexican nationalities and  
23      criminality. And yet --

24           THE WITNESS: Right.

25           THE COURT: Right? Is that -- so when you

1       said there was that general understanding, that's what  
2       you were talking about?

3                     THE WITNESS: Yes. That's what I'm talking  
4       about.

5                     And, you know, the, the point I'm trying to  
6       make is despite the fact you have empirical evidence  
7       that there is no association between these two things,  
8       you have the continued referencing of criminality as  
9       a reason for immigration restriction, either, as I  
10      mentioned earlier, you know, through that study at  
11      the GI form, but you also have individuals, like,  
12      Senator Kilgore of West Virginia, who notes in debate  
13      over the quote, unquote, Wetback Bill, that practically  
14      every state in the Union has had the wetback problem.  
15      Some of these people cannot meet the standards of  
16      immigration. They may be criminals because they are  
17      wetbacks. They can be kept in a state of peonage.

18                     So this link between the, kind of,  
19       undocumented identity or the Mexican identity --  
20      because, again, this was kind of understood as a  
21      racialized identity at the time -- is still being  
22      linked to criminality, despite the evidence, the  
23      empirical evidence that there are no linkages between  
24      these two things.

25                     THE COURT: And Ms. Gorman, I think the

1 focus I would like for us to focus on is evidence of  
2 the latter.

3 MS. GORMAN: The latter?

4 Sorry.

5 THE COURT: In other words --

6 MS. GORMAN: What do you mean?

7 THE COURT: I understand, Professor Gonzalez  
8 O'Brien to testify that despite empirical evidence  
9 that doesn't support this link, there continues to be,  
10 I guess, a disregard for the empirical evidence,  
11 when in -- at least surrounding the codification of  
12 Section 1326. So I'm looking for evidence of that  
13 discussion, or lack thereof, which is, to me, the one  
14 quintessential issue I have left in deciding the motion.

15 BY MS. GORMAN:

16 Q. Professor Gonzalez O'Brien, then talk to me, I  
17 guess, as a social scientist, about how you would suss  
18 out racial animus and the codification of Section 19 --  
19 or 1326. I want to say 1926.

20 So how does a social scientists do that?

21 A. Well, I think part of this is looking at,  
22 you know, what were the justifications made for the  
23 recodification of 1326 in 1952, but also going forward,  
24 right?

25 I mean, the most recent codification of 1326 is

1       in 1996 under the Illegal Immigration Reform and  
2 Immigrant Responsibility Act. So if you are looking to  
3 establish that racial animus is kind of a motivating  
4 factor -- now I think we have relatively clear evidence  
5 that this the case in 1929, right? You know, we have,  
6 we have these statements by members of the Immigration  
7 and Naturalization Committee, and leading proponents of  
8 this legislation, that part of the reason that you need  
9 this is as a control on Mexican entry into the United  
10 States because Mexicans are of a, kind of, mongrelized  
11 bloodline.

12           But also in addition to these notions of racial  
13 purity, you also have these attributions of certain  
14 inherent traits that go hand-in-hand with Mexican  
15 identity: Criminality, the tendency towards peonage,  
16 some mentions of illiteracy, of potentially being  
17 disease carriers. Now that carries forward in  
18 discussions over future immigrations legislation.  
19 You do see that reflected in discussions of the  
20 Wetback Bill in 1952, preceding McCarran-Walter. You  
21 have a recognition that the term "wetback" is used to  
22 reference these individuals who are seen of being as --  
23 of inferior quality, of having criminalistic tendencies.  
24 And, you see references -- you see the use of that  
25 term -- a racially derogatory term -- in that letter

1 from Peyton Ford, the Deputy Attorney General, that  
2 was entered into the Congressional Record. And so you  
3 have that present in 1952, even if the McCarran-Walter  
4 Act itself does not contain discussion of Mexican  
5 immigration to the United States, because that was  
6 not the thrust of the McCarran-Walter Act, right? That  
7 was the thrust of the earlier Senate Bill 1851, or the  
8 Wetback Bill.

9           But I think if you look at even debate over  
10 the Illegal Immigration Reform and Immigrant  
11 Responsibility Act, you still have these continued  
12 attributions of criminality to illegal immigrants.  
13 And by the time you get all the way up to 1996, it  
14 is not just one governmental report by that point. It  
15 is two governmental reports: The 1931 Wickersham  
16 Commission and the 1994 U.S. Commission on Immigration  
17 Reform, which preceded the passage of the Illegal  
18 Immigration Reform and Immigrant Responsibility Act.  
19 And despite that, you still have individuals, like  
20 Lamar Smith, ranking member of the Judiciary Committee,  
21 in debate over the Illegal Immigration Reform and  
22 Responsibility Act, noting that illegal aliens are ten  
23 times more likely than Americans, as a whole, to have  
24 been convicted of a federal offense. Think about the  
25 cost, in pain and suffering, to the innocent victims

1 and families.

2 You have Representative Greg Laughlin of Texas  
3 stating that because of the border fence, the rapes,  
4 the robberies, the drug sales, the murders went down.

5 Spencer Abraham, in the Senate, noting that by  
6 conservative estimates almost half-a-million felons  
7 are living in this country illegally. These aliens  
8 have been convicted of murder, rape, drug trafficking,  
9 potentially such crimes as espionage, sabotage, treason,  
10 and a whole -- and a number of other serious crimes.

11 So, you have this continued attribution of  
12 criminality to illegal immigrants, a racially coded  
13 category. And despite that, though, you have a raft  
14 of evidence proving otherwise. Evidence going back  
15 to 1931, but evidence that grew in the periods following  
16 that, and particularly across the 1990s and 2000s.

17 So, you have that U.S. Commission on Immigration  
18 Reform report in 1994, that found that crime rates in  
19 border cities were actually lower than crime rates --  
20 than crime rates in cities in the interior.

21 Now, again, if you're making a -- if you're  
22 arguing that undocumented immigrants are more  
23 predisposed towards criminal behavior, then in those  
24 border cities, which have a larger percentage of  
25 undocumented immigrants, then -- or are likely to have a

1       larger percentage of undocumented immigrants -- then  
2       you would expect crime rates to be higher. And that's  
3       not what you're finding.

4           A survey of all the literature to date, in 2000,  
5       found no empirical support in any of the published  
6       studies, either governmental or academic, for any  
7       linkage between illegal immigration, immigration, and  
8       criminal behavior. And this is something -- and the  
9       Cato Institute has put out a whole host of studies also  
10      looking at this question, which similarly have found  
11      no support for the idea that illegal immigrants are  
12      more predisposed towards criminal behavior. And, yet,  
13      we continue to see this reference. And we continue to  
14      see this reference because it is linked to these notions  
15      of otherness, of racial otherness. And it is something  
16      that is synonymous in many ways with the construction of  
17      the illegal immigrant in the, kind of, American psyche  
18      at this point.

19           And some public opinion work, I -- you know, I  
20      did back for my first book, looked at agreement among  
21      the American public with this -- with the statement  
22      that illegal immigrants are more likely to be involved  
23      in drugs and gangs -- with drugs and gangs, and over  
24      45 percent agreed. And so you have this attribution of  
25      a racialized trait that we see begin in 1929 -- because

1 you really don't see a great deal of discussion of  
2 this in Mexican criminality prior to that -- but you  
3 see that carried forward. You see it carried forward  
4 into the discussion of wetbacks in 1952, and the  
5 construction of the, uh, the stereotype of what a  
6 wetback was. And then you see that carried forward  
7 into 1996, where now we're taking about illegal  
8 immigrants. But, all of these are just reconstructions  
9 of the same term.

10 Q. When we talk about racial animus as a motivating  
11 factor in the recodification in 1952, I guess is it  
12 fair to summarize it -- as a social scientist, one of  
13 the ways you suss out racial animus is, you know, this  
14 sort of awareness of the eugenist history of the  
15 legislation being codified; but, in addition to that,  
16 the sort of racial slurs and the historical context  
17 around it, including the re-patronization of Mexican  
18 Americans, and the use of the term "wetback" and  
19 discussion of the wetback in not just McCarran-Walter,  
20 but in the Wetback Bill that preceded it by three  
21 months? So you see the same, sort of, eugenics tropes  
22 and language being used to characterize Mexicans or  
23 undocumented immigrants in 1952, as you did in,  
24 essentially, 1929?

25 A. Right. And, you know, policy-making doesn't

1 occur in a vacuum. I mean, it doesn't occur without  
2 the influence of the policies that came before it, and  
3 especially policies in related areas. And so the  
4 influence not only of the past policy decisions, but  
5 of, uh, thinking on race at that period in time, and  
6 also of the kind of long-term construction of racial  
7 categories, and racial categorization in this country.  
8 You know, the construction of racial categories is a  
9 project. It doesn't just occur at one point in time  
10 and then never change. It does change over time. And  
11 the attributions sometimes change over time.

12 But, you see many of the same references back  
13 to ascribed inherent traits in the discussion of  
14 wetbacks in the 1950s, or the discussion of illegal  
15 aliens in the 1990s, despite the fact that, again,  
16 especially with the -- with the notion that they're  
17 more inclined towards criminal behavior -- which has  
18 been something that has long been used to argue for  
19 immigration restriction in this country -- um, you don't  
20 have support for it. And it's something that even, you  
21 know, after 1996, we continue to see the attribution  
22 of criminal -- of criminal tendencies to undocumented  
23 immigrants or Mexican immigrants, depending on who is  
24 speaking at the time. But, we continue to see this  
25 attribution. It's a racial attribution. It was in

1       1929. It was in the 1950s. And, it continues to be  
2 today because it is applied broadly.

3           As the 1951 report noted, people can't tell if  
4 someone is undocumented or not. So we can split hairs  
5 over, well, we're just saying these are the undocumented  
6 folks. But that racial categorization is applied -- or  
7 that negative categorization is applied to all people  
8 who look as if they could be of that group that is  
9 characterized as the kind of iconic undocumented  
10 immigrant, and that is the Mexican.

11          Q. One of the things that sort of struck me in  
12 thinking of about it, is that Truman -- who, I guess,  
13 I didn't conceptualize as, you know, necessarily, a  
14 progressive in any sense -- but he actually veto'd  
15 the McCarran-Walter Act. And can you talk a little  
16 bit about that?

17          A. Well, the McCarran-Walter Act is sometimes  
18 pointed to as a piece of richly progressive legislation.  
19 And it wasn't. Now it's true it removed racial  
20 restrictions on immigration. So prior to  
21 McCarran-Walter, and under the Johnson-Reed Act,  
22 individuals of Asian descent, because they could  
23 not become American citizens, they also could not  
24 immigrate. McCarran-Walter removes those racial  
25 restrictions, so now Asian immigrants can come to

1       the United States. But, the quota that is assigned to  
2       all the Asian Pacific Triangle is 2,000 quota spots,  
3       2,000 visas. And I believe that was roughly equivalent  
4       to the number of visas given to a single country like  
5       Sweden at the time, and was dwarfed by the number of  
6       visas given to, say, the United -- to the UK during this  
7       period.

8                   So McCarran-Walter is viewed as -- is sometimes  
9       characterized as racially progressive because it removes  
10      these restrictions, but Truman's veto explicitly notes  
11      that there -- that the McCarran-Walter Act, while it  
12      had some good things going for it, also, uh, in the  
13      words of Truman, from his letter to Congress, "would  
14      perpetuate injustices of longstanding against many other  
15      nations of the world..." -- and jumping forward a little  
16      bit -- "...and intensify the repressive and inhumane  
17      aspects of our immigrations procedures. The price is  
18      too high and, in good conscience, I can't agree to  
19      pay it.

20                  And there were also -- you know, there also were  
21      a few times where the masks flipped a little bit off the  
22      face of this is racially neutral, at least, legislation,  
23      with Representative Wood of Georgia noting during the  
24      debate on McCarran-Walter, that, "It seems to me the  
25      question of racial origins, though i am not a follower

1 of Hitler, there is something to it. We cannot tie a  
2 stone around its neck and drop it in the middle of the  
3 Atlantic, just because it worked to the contrary in  
4 Germany. The fact still remains that the peoples of  
5 western Europe have made good American citizens. I  
6 believe that possibly statistics would show that the  
7 western European races have made the best citizens in  
8 America."

9 And McCarran-Walter continued to privilege  
10 northern and western Europeans, over all others, in  
11 terms of the quotas that were assigned based on either  
12 national origin or race.

13 Q. One of the things that you touched on in talking  
14 about that was, sort of, the different treatment of  
15 Mexican Americans or Latinos from immigrants from, let's  
16 say, like, northern Europe or Nordic countries, and --  
17 which sort of harkens back to some of the treatment that  
18 we had talked about at the border, that were at the  
19 southern border. They weren't at the northern border.  
20 So going into this time period, do you still see --  
21 like, for the example, with the Bracero program, this  
22 sort of -- the way that people are treated at the  
23 southern border, being very different from the way that  
24 people are being treated at the northern border? So is  
25 that still --

1       A. You do still -- you do still see some  
2 differences. And I think Dr. Lytle Hernandez already  
3 spoke to some of those. But in terms of the admission  
4 procedures for Braceros during this period, the need  
5 for, you know, medical inspections, chest x-rays, other  
6 things like that, because there continued to be, you  
7 know, again, attributions that go back to the 1920s,  
8 of -- you know, that Mexico was a dirty place, where  
9 people lived in slums and were more predisposed towards  
10 carrying illnesses. So, you know, that does carry  
11 forward.

12           And you do see some of that. It's not as  
13 pronounced, certainly, by the 1950s as what you see in  
14 the 1920s. But, the 1920s is very openly and explicitly  
15 racialized and racist. You get -- that gets a little  
16 cleaned up, and some of the procedures are not quite as  
17 invasive as what you were seeing in the period of the  
18 1920s. But, you continued -- you continue to see a  
19 different treatment of the two borders.

20           And again, that ability for pre-examination in  
21 Canada, in 1945, Mexicans are excluded from that. So,  
22 initially, there -- you know, there's this difficulty of  
23 if you're Mexican and you can apply for pre-examination,  
24 you still have to get up to Canada to go to one of  
25 the -- to go to one of the consuls and get approved to

1 return back into the United States, as illegal entrant.  
2 But after 1945 that is revised, and citizens of Mexico  
3 are just excluded from that. So they no longer can  
4 even utilize what is extended to Canadians. And the --  
5 that that wouldn't end for Canadians until '61.

6 Q. So one of the things that you had -- that  
7 Professor Lytle Hernandez talked about also -- was the  
8 sort of -- the difference between just straightup  
9 exclusion, and then using Latinos and Mexican Americans  
10 as the sort of temporary labor force that can be, um,  
11 incarcerated or expelled at will, but could still be  
12 utilized by American agriculture.

13 And one of the things we had talked about was,  
14 in the Wetback Bill, was the sort of exemption of the  
15 American employer from the -- essentially from harboring  
16 an alien. So, the employer was sort of cutout from this  
17 because the employer still needed a, sort of, migrant  
18 laborer. But, is it your understanding also that an  
19 illegal re-entry, let's say conviction, would also  
20 cut off your path to that sort of permanency --

21 A. Uh-huh.

22 Q. -- that sort of creating roots, and sort of  
23 funnel you in again to being this sort of temporary  
24 source of racialized labor?

25 A. Right. And, you know, criminal convictions can

1 bar, you know, bar you from legal entry into the United  
2 States. And so the attachment of these, especially  
3 felony convictions, was 1929. Uh, to undocumented entry  
4 means that, you know, in the period following 1929, and  
5 if, you know, you cross back in after being deported,  
6 then that, that makes it impossible for you to legally  
7 immigrate at any point.

8 And there have always been exceptions, right?  
9 You know, Dr. Lytle Hernandez talked about these kind  
10 of push and pull factors. But one thing that is -- one  
11 exception that has traditionally been made in the,  
12 in American immigration policy, has been an exception  
13 for the responsibility of employers. As I mentioned,  
14 and as Dr. Lytle Hernandez mentioned, employers were  
15 oftentimes knowingly employing undocumented immigrants.  
16 Even during the period of the Bracero program, you had  
17 employers who were still -- who are on record saying,  
18 you know, it's still easier to go down to the southern  
19 border and get workers, than it is to go through the,  
20 kind of, red tape of all of this.

21 And the attempts to place some of the  
22 responsibility on the shoulder of American employers  
23 of undocumented immigrants have been either not present  
24 at all in 1929, or relatively half-hazard in the years  
25 following that. I mean, there were employer sanctions

1       extended under the Immigration Reform and Control Act  
2       of 1986, but those, those had so many loopholes, that  
3       the fines were so low and the loopholes so big, that it  
4       really didn't have much of a significant effect  
5       on employers.

6           And also, of course, other things changed in  
7       the 1980s and the 1990s in terms of forged documents and  
8       other things like that. But, you do have, you know --  
9       the idea was that Mexicans were fine as long as they  
10      came here only to work. They were -- they were meant  
11      to be a disposable labor force. This is noted in the  
12      1911 Dillingham Commission report, that: "While  
13      Mexicans are not easily assimilated, this is not of  
14      great importance, as long as they return to their  
15      native land in a short time."

16           And this was the point of the Bracero program,  
17      right? We'll bring them in. We'll have them do the  
18      labor that they're needed for, and then have it -- we  
19      can make sure that they go back to Mexico. The problem  
20      with wetbacks is that there is no guarantee that they  
21      go back to Mexico, right, because they are undocumented.  
22      You don't know that they leave. You don't have that  
23      additional level of control over them.

24           And so there's a desire to preserve access to  
25      this thing that American -- especially American cultural

1       interests say we need Mexican labor, right? You have  
2       cut off all these other potential spickets for labor  
3       force, right? You cut off access to Chinese labor. You  
4       cut off access to southern and eastern European labor.  
5       And now what we have left are the Mexicans. Or, as  
6       Dr. Lytle Hernandez pointed out, or the blacks. And  
7       you don't want -- you know, you don't want the blacks  
8       coming into Texas, so you say, well, we'll go with the  
9       Mexicans.

10           And so they were viewed as disposable labor. As  
11          long as they returned, they didn't pose a racial threat  
12          to the United States. They didn't provoke those racial  
13          anxieties. It was when that control started slipping  
14          during the period of 1950s, when you start to -- and  
15          in the period leading up in 1929, right, when you have,  
16          kind of, unfettered crossing between the United States  
17          and Mexico, especially in terms of undocumented  
18          entry. But when you start to have the growth of the  
19          undocumented population in the 1950s, this is when  
20          you start to see the beginning of these, kind of, really  
21          large-scale deportation actions, such as Operation  
22          Wetback, and the discussion of the potential performance  
23          of illegal immigrants in the United States. And,  
24          this idea that they are no longer that controllable  
25          population. Because part of what you want, right, out

1 of a racially inferior, but necessary labor force,  
2 is you want to ensure that they, that they go back,  
3 that they are here for as long as we need them.

4 And on the one hand, those temporary employment  
5 programs worked for that. And that is paired with this  
6 idea -- you know, with the ability to designate them as  
7 illegal and deport them when they are no longer needed,  
8 or at least you try apply enough pressure to force them  
9 to, kind of, self-deport, right? Something that was  
10 referenced by Mitt Romney in 2012, right? This idea,  
11 well, maybe if we just make this things bad enough,  
12 all those illegal immigrants will just return to  
13 Mexico.

14 And this harkens back, again, to the Mexican  
15 re-patronization program. And, again, is a  
16 demonstration that none of these things occur in a  
17 vacuum, without knowledge of what came before, right?  
18 Lawmakers, in most cases, have some knowledge of the,  
19 kind of, general arch of immigration policy --  
20 especially if they're serving on some of these  
21 committees. Or, uh, I guess I shouldn't say that  
22 they do. If they don't, they should.

23 Q. So I -- so you had talked about, a little bit  
24 about, sort of, Operation Wetback, but I don't think --  
25 I want to distinguish Operation Wetback from the

1 re-patronization of Mexicans that happened during the  
2 Depression, and then the Braceros program.

3 And then talk a little bit about the exploitation  
4 of migrant labor during the Braceros program, both by  
5 Braceros and by undocumented immigrants.

6 That's three questions.

7 A. Can you break that into pieces and chunks,  
8 please?

9 I'll do my best to respond to that.

10 So, we didn't talk a lot about Operation Wetback.  
11 I think Dr. Lytle Hernandez mentioned -- talked about  
12 it a little bit. But it was a -- you know, it was a  
13 mass deportation program that was meant to address some  
14 of these issues with the growth of the undocumented  
15 population, and also supposed to be kind of a prod  
16 to employers who were employing large number of  
17 undocumenteds, that you need to kind of employ Braceros  
18 and not undocumented immigrants. But, the estimates are  
19 that -- and it begins in 1954 -- the estimates are that  
20 around 1.1 million people were deported under Operation  
21 Wetback or returned -- although, again, you get into  
22 kind of fuzzy numbers in some cases. So I don't want to  
23 be -- I will say that that number is -- that number is  
24 probably not definitive, right? It's an approximate.  
25 But, it also utilizes -- again, to go back to this idea

1 of racial animus, it also utilizes a term that is,  
2 you know, recognized as racially derogatory. Again,  
3 going back to that 1951 report that I cited earlier,  
4 this idea that, you know, there was a recognition that  
5 the term "wetback" carried all this baggage, and was  
6 broadly applied to anybody of Mexican descent.

7 In addition, you know, there was a lot of  
8 exploitation, both the Bracero program -- as Dr. Lytle  
9 Hernandez pointed out, Mexico was a junior partner.  
10 And in, in the 19 -- I think it was -- hold on. Let me  
11 find my -- let me look at my notes here.

12 In 1954, Mexico gave up its ability to  
13 unilaterally blacklist employers who were exploiting  
14 Mexican laborers. So, in some cases, that exploitation  
15 may take the form of a promised wage of \$0.50 an hour,  
16 and workers show up and, you know, they're told that  
17 they're going to be paid \$0.30 an hour; or, they're --  
18 one of the things that was supposed to be provided for  
19 Braceros was housing and, uh, some additional funds to,  
20 kind of, feed themselves. And in some cases, either the  
21 housing was substandard, the food was not enough to  
22 feed the number of people who were there, and so you  
23 did have this exploitation of the program because there  
24 just weren't a lot of consequences for violations of  
25 the program.

1           You know, as I mentioned, in 1956, you have  
2 1631 employers reported for violating the program,  
3 and only 50 of them are removed. So there's an  
4 understanding of, like, what are you going to do?

5           Like, you went -- as a Bracero, you went through  
6 this whole process to get this job, right, to improve  
7 your life, or the life of your family, and now you're  
8 here and they say, well, we're not going to pay you what  
9 you were supposed to be guaranteed. We're going to pay  
10 you less than that. If you don't like it, you can go  
11 back to Mexico. And so, you know, the mechanisms that  
12 Braceros had at their -- you know, that they could use  
13 to kind of leverage this agreement for their benefit,  
14 uh, were more limited.

15           Now, were they as limited as they were for  
16 undocumented immigrants? Certainly not. But, they  
17 still were very limited. And the legal status accorded  
18 to them was based, in many ways, just on the need  
19 for their labor, and not out of any desire to actually  
20 protect them.

21           Q. One thing I had learned, sort of, about the  
22 Braceros that I didn't know before is, I guess, the  
23 life of a Bracero was assigned \$1,000 to his widow or  
24 other family, but that it wasn't necessarily -- or I  
25 guess -- or wasn't paid when a Bracero died on a farm

1 or a factory.

2 Do you know -- so, I guess, is it sort of your  
3 general understanding that the protections that were  
4 supposed to at least on paper be afforded to these  
5 people coming from Mexico, just as a general matter,  
6 were they actually protected in practice?

7 A. I mean, I think there, you know, there is  
8 variation there. In some areas and with some employers,  
9 perhaps the employers observed the terms of those  
10 contracts more closely than other employers did. But,  
11 again, the ability for Braceros to take action -- I  
12 mean, they could complain to the consulate. They could  
13 do things like that. But, in many cases, you don't  
14 see -- you don't see action taken on the part of the  
15 government to ensure that employers are following the  
16 terms of the contract. And I think that's reflected  
17 in that statistic, that this is just not being enforced  
18 as much.

19 And so if you're an employer who, perhaps, is  
20 shorting Braceros on wages, or providing unsafe or  
21 substandard living conditions for them, you know,  
22 their avenues to have that addressed are both uncertain  
23 and relatively limited.

24 THE COURT: All right. Ms Gorman, I'm going  
25 to interject. I think that I should take a break to

1 allow everyone time to take a lunch break.

2 So, this is all very interesting. As  
3 someone who majored in history, I find it interesting.  
4 But, I also don't want this to be out of control, in  
5 the sense that it's not -- the hearing is not to have  
6 a discussion or dissertation on just a general history.  
7 When we return from the break, I would like to refocus  
8 because earlier -- and I will have some follow-up  
9 questions for Professor Gonzalez O'Brien after the  
10 attorneys are finished, but just for my general thought,  
11 earlier, Professor Gonzalez O'Brien began to talk about  
12 the justification for the codification of Section 1326  
13 in 1952, but then I didn't really get a clear answer, so  
14 I would like to refocus on that issue. And like I said,  
15 I'll have some questions. If you don't refocus, I'll  
16 refocus you.

17 So let's take -- oh, did Ms. Gorman drop  
18 off?

19 THE CLERK: Yeah.

20 MS. GORMAN: I'm here.

21 THE COURT: We'll take our lunch break and  
22 resume at -- let's resume at 1:30.

23 (Noon recess taken.)

24

25

1 Reno, Nevada, Tuesday, February, 2, 2021, 1:30 p.m.

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4 THE CLERK: Court is back in session.

5 THE COURT: Ms. Gorman, are you ready to  
6 resume?

7 MS. GORMAN: I am, Your Honor.

8 May I resume?

9 THE COURT: Yes.

10 MS. GORMAN: Okay.

11 **DIRECT EXAMINATION (resumed)**

12 BY MS. GORMAN:

13 Q. So I guess to be more to the point, Professor  
14 Gonzalez O'Brien, regarding the 1952 recodification,  
15 is it your opinion, as a political scientist, that it  
16 was motivated by racial animus?

17 A. It is.

18 Q. And can you tell me, as a social scientist, how  
19 you reached that conclusion? Looking at the historical  
20 context and the legislative context? Can you try to  
21 summarize it? And I know we've been through a lot of  
22 it. Sorry.

23 A. Well, I think you have to look at a couple  
24 things. I think, first, you have to look at the context  
25 in which, uh, Mexican immigration was being discussed at

1       that historical moment. We talked about that a little  
2       bit in regards to the Wetback Bill; also the reference  
3       to wetbacks in that document by the Deputy Attorney  
4       General.

5           So, I think it's important to understand it in  
6       the context of that. But it's, I think -- even though  
7       it's recodified in 1952, I think the fact that there is  
8       no debate on the prob -- the very overt problematic  
9       aspects of its original codification in 1929, suggests  
10      that there was nothing -- there was no problem seen  
11      with the motivation for the original codification of  
12      1326 in 1929. Again, using language that was very  
13      openly and explicitly racist, that made numerous  
14      references to the necessity of preserving the kind of  
15      purity of racial bloodlines in the United States, the  
16      mongrelization of the Mexican or Latino bloodline.  
17      So I think in understanding the recodification under  
18      McCarran-Walter, it has to be done in the context both  
19      of what came before it, but also what was occurring at  
20      that historical moment, and at that moment in time.

21           And I think if you look at all of those things,  
22      including the racial animus that was demonstrated in the  
23      McCarran-Walter Act itself, in the continued assignment  
24      of individuals of Asian descent to a kind of broad  
25      category, and the assignment of national identities to

1      Europeans, which continued under McCarran-Walter, then I  
2      think all of those things suggest that the decision to  
3      pass this without debate, was largely driven by the same  
4      things that drove the original codification of 1326;  
5      and that was, in part, a desire to control access to  
6      Mexican labor, and also a tendency to view Mexicans,  
7      individuals from south of the Rio Grande, and at least  
8      in the terms of the 1950s, the wetback, as a problematic  
9      population. And you don't see any significant debate  
10     over -- you have a stretch between 1959 and 1952, where  
11     you have 1326 in effect, and you don't see any debate  
12     over that policy on its merits.

13           We've been doing this for over 20 years by that  
14     point. What are the merits of 1326? Why should it  
15     be recodified? Is it serving the function it was  
16     originally intended to serve -- even if we characterize  
17     that as one of maintaining racial purity, but is it  
18     serving the purpose that it is supposedly -- if we think  
19     about it in race neutral terms, it is meant to serve  
20     as a deterrent. Is it just serving that deterrent  
21     function? You don't have a debate over that in 1952.

22           And, you, actually, don't have a debate over  
23     that, really, in most of the either initial  
24     codification -- or sorry -- the recodification in  
25     '52, or the subsequent reenactments in legislation

1 going forward.

2           What is the purpose of this? If it is racially  
3 neutral, then does it serve its stated goals of acting  
4 as a deterrent to undocumented immigration.

5           MS. GORMAN: I don't know if the Court has  
6 any follow-up questions as well -- and then I guess I --  
7 and as part of that context if the, sort of, original  
8 motivation is this compromise over eugenics, and having  
9 a control over an exploitable labor force, was that  
10 effective going forward when you talk about Mexican  
11 re-patronization and the Bracero program, and the  
12 utilization of those migrants as sort of a temporary  
13 labor force?

14           THE WITNESS: Yeah. You know, one of the  
15 points of the Undesirable Aliens Act was to create a  
16 labor force in the United States that would serve  
17 the interests of, um, usually southern agribusiness,  
18 but the United States more broadly, but at the same  
19 time have no permanence, be deportable, be controllable  
20 and, therefore, offer a mechanism by which to preserve  
21 the racial integrity of the United States, by ensuring  
22 that these populations don't establish permanence, which  
23 then can lead to (unintelligible) and other effects on  
24 the racial purity of the nation.

25           MS. GORMAN: Your Honor, I know if this

1 Court have any follow-up questions before I pass the  
2 witness?

3 THE COURT: Well, I'm going to let  
4 Mr. Walkingshaw do his cross-examination. And I'll  
5 let you both exhaust your questions. And if I find the  
6 questions I have are not answered, I'll intervene.

7 Mr. Walkingshaw.

8 MR. WALKINGSHAW: Thank you, Your Honor.

9 **CROSS-EXAMINATION**

10 BY MR. WALKINGSHAW:

11 Q. Good afternoon, Professor O'Brien.

12 A. Good afternoon.

13 Q. I was going to say good morning.

14 So, Professor Gonzalez O'Brien, I believe you  
15 mentioned at the outset of your direct testimony  
16 that you have written a few books on the subject of  
17 immigration, correct?

18 A. Uh-huh.

19 Q. One of them is called Handcuffs and Chain Link,  
20 correct?

21 A. Yes.

22 Q. Is it fair to say that that work is based  
23 off a dissertation that you wrote, I believe it was  
24 copyrighted in 2014, for your Ph.D thesis at the  
25 University of Washington?

1       A. That's accurate. It's an expanded version of  
2 what was submitted for my dissertation.

3       Q. Yeah. But much of the text is the same, correct?

4       A. There's, uh -- I mean, I don't know -- I don't  
5 know the exact percentage of text that is -- that  
6 mirrors exactly what was in my dissertation. It went  
7 through a couple peer -- it went through a period of  
8 peer review with the University of Virginia Press before  
9 going to publication, so there were changes and then  
10 there were expansions to certain segments based on some  
11 of the reviews from the individuals who were sent a copy  
12 of the manuscript.

13       Q. I would like to ask you some questions about  
14 those documents --

15       A. Okay.

16       Q. -- if I could. So --

17       A. If I may clarify, are you asking me, also,  
18 questions about my dissertation, my memory of which  
19 is now quite foggy, since I submitted my dissertation  
20 in 2014, and have really only read this in the form  
21 of the subsequent publication of it. That would be  
22 Handcuffs and Chain Link. I don't know how accurately  
23 I can speak to exactly what appears in my dissertation  
24 from 2014.

25       Q. Fair enough. I'll try to frame it as things you

1 wrote in the book.

2 So in the introduction of the book, you did  
3 write that: "The 1929 Act" -- uh, which I -- I'll use  
4 a shorthand -- I'm going to use some shorthand terms for  
5 the benefit of the court reporter. And I'll try to  
6 speak slowly -- but I'm going to call the Undesirable  
7 Aliens Act of 1929, "the '29 Act."

8 Fair?

9 A. Sure.

10 Q. Do you understand?

11 A. Yes.

12 Q. Okay.

13 A. I get it.

14 Q. And I'll try to define terms as I go.

15 But you wrote that: "The 1929 Act was  
16 attributable to a few things, including the success  
17 of immigration restriction in 1924" --

18 A. Uh-huh.

19 Q. Correct?

20 A. Correct.

21 Q. "Hardening notions of sovereignty following  
22 World War I," correct?

23 A. Correct.

24 Q. "And the Great Depression," correct?

25 A. Correct -- well, the beginning of the Great

1 Depression, yeah. The beginning of an economic  
2 downturn.

3 Q. And you wrote that: "The Great Depression, like  
4 most economic downturns, increased nativism," correct?

5 A. Yeah. You see an increase in nativism associated  
6 with most economic downturns.

7 Q. Right.

8 That "it helped drive perceptions of economic" --  
9 "the Great Depression," rather, "helped drive  
10 perceptions of economic threat from immigration,"  
11 correct?

12 A. Yeah.

13 Q. All right.

14 And in your dissertation and your book -- I  
15 believe they're both the same on this point --

16 A. Yeah.

17 Q. You, uh, you write that: "The passage of the  
18 1929 Act led to a 57-year period where there would be,  
19 in your view, no congressional action on undocumented  
20 immigration," correct?

21 A. Very little. I mean, I mention the Wetback Bill  
22 in Handcuffs and Chain Link in passing, as a kind of,  
23 uh, you know, expansion of some of the things. But what  
24 I'm talking about -- oh, sorry. I'm talking too fast  
25 again.

1           What I'm -- you know, what I mean by that 57-year  
2 period is that you don't see a significant overhaul  
3 of how we really approach immigration until the  
4 immigration -- the Immigration Reform and Control Act  
5 of 1986. So, you don't see a significant overhaul of  
6 how undocumented immigration specifically is addressed.

7           Now, that is not to say legal immigration is not  
8 addressed in 1952 with McCarran-Walter, or 1965, with  
9 Hart and Celler; nor that there isn't -- there aren't  
10 other pieces of legislation that occur over the  
11 course of this period.

12           But in terms of significant legislation and  
13 legislation that constituted a significant overhaul  
14 of how we address undocumented entry into this country,  
15 the argument that I make is that 1929 and 1986 are  
16 two of the big moments in U.S. immigration policy  
17 in terms of undocumented immigration specifically.

18           Q. And, uh --

19           A. I do think I make that point both in my  
20 dissertation and in my book.

21           Q. I believe that's correct.

22           So, fair to say then, based on your answer  
23 just now, you view the 1986 Immigration Control and  
24 Reform Act as a major overhaul of how we approach  
25 undocumented immigrations in this country?

1       A. I mean, yeah, the Immigration and Control Act was  
2 a significant piece of legislation. I mean, I think  
3 that is, uh, in -- to borrow from Dr. Lytle Hernandez --  
4 I think that is in the mainstream of writing on U.S.  
5 immigration policy.

6       Q. All right.

7                  And for the benefit of the court reporter,  
8 I'm going to refer to that act as IRCA, which is a  
9 pronunciation of I-R-C-A. Is that a fair -- do you  
10 understand that --

11      A. That's fair.

12      Q. Okay.

13      A. I like the tongue twisters better. But, it's  
14 probably easier for the court reporter.

15      Q. Right.

16                  And to summarize the -- and correct me if  
17 I'm wrong here, but the thesis -- or one of the thesis  
18 of your dissertation and your book is that IRCA was  
19 an opportunity to re-envision how we approach or  
20 documented immigration in this country, correct?

21      A. Certainly. Yeah.

22      Q. And you refer to it in both documents as what's  
23 referred to as a "critical policy failure," correct?

24      A. Yeah.

25      Q. And what you mean by that, among other things,

1       is that it failed to reduce the overall undocumented  
2       population in the U.S., correct?

3           A. Uh-huh. Yes.

4           Q. Thank you.

5           And just for the benefit of the court reporter,  
6       if you could -- I know you caught it eventually -- but  
7       if you could respond with a "yes" as opposed to a  
8       "uh-huh."

9           A. Yes.

10          Q. And I will try to speak slower.

11          A. Yes. I agree.

12          Q. All right.

13           And then the sort of further thesis of both  
14       your dissertation and your, and your book, is that  
15       this critical policy failure led to a return to  
16       the criminalization of immigration itself. So,  
17       criminalizing the immigrants --

18          A. Uh-huh.

19          Q. -- as embodied in the -- what I'll call IIRIRA,  
20       but the 1996 Act, correct?

21          A. Yes.

22          Q. And, I'm sorry. What's the full name of the Act  
23       that I'm referring to?

24          A. The Illegal Immigrations Reform and Immigrant  
25       Responsibility Act.

1 Q. Okay. And I'll call that IIRIRA.

2 A. Okay. I didn't write it, so you can call it  
3 whatever you want.

4 Q. Fair enough.

5 Sorry. Lots of terms here. I'm trying to  
6 cutdown on fingers typing?

7 And you referred to, in your direct testimony,  
8 that's the last time that Congress really addressed  
9 this issue as well, correct?

10 A. Uh, as a point of clarification, that's the  
11 last time a significant legislative package was passed  
12 overhauling how undocumented immigration is addressed.  
13 It certainly isn't the last time immigration is  
14 addressed period, either legal immigration or illegal.  
15 But, that's the last passage of a significant policy  
16 that changes, kind of, the approach to undocumented  
17 immigration, or addresses it in some manner.

18 Q. Well, thank you for the clarification.

19 So as you discussed earlier, there were times  
20 when Congress addressed legal immigration in this  
21 intervening period, correct?

22 A. Yes.

23 Q. And as we've discussed, the 1952 Act is -- and  
24 when I say "the 1952 Act," I'm referring to the  
25 McCarran-Walter Act. That's one of them, correct?

1 A. Yeah.

2 Q. That is the Act that passed -- I'm trying to  
3 frame this in a way that we won't disagree about it --  
4 but that's the Act that passed the, uh, 19 -- the 1326  
5 provision that is in effect today, subject to further  
6 amendment, correct?

7 A. Right. Correct. The recodification of the -- of  
8 the, uh, the Undesirable Aliens Act.

9 Q. Okay.

10 And if you had written -- sorry.

11 You testified earlier that there is some  
12 disagreement as to whether or not the McCarran-Walter  
13 Bill was a progressive Bill, correct?

14 A. Yeah. I mean, I, I think in -- sometimes when  
15 I've seen it referred to just in news stories and things  
16 like that -- and some of the early encounters I had with  
17 McCarran-Walter as a graduate student, if we want to go  
18 all the way back to the yesteryears of my professional  
19 experience, you know, the removal of racial restrictions  
20 on immigration was seen as being a liberalization of the  
21 immigration policy, right? You were no longer saying  
22 that you can't immigrate -- you can't come to this  
23 country if you're Asian, right? You cannot become a  
24 citizen if you're Asian. So, that did represent a  
25 liberalization of immigration policy. But, I think

1       that term is often stretched a little thin when  
2       referencing McCarran-Walter, when you actually look  
3       at the provisions of the Act itself.

4       Q. All right.

5           So, fair to say you don't view it as progressive  
6       though?

7       A. I don't view it -- uh, I will say yes, but... I  
8       view the removal of racial restrictions as something  
9       that is -- that was a good thing at that point in time.  
10      I don't think, as a whole, that it is necessarily a --  
11      or that it is a what I would call, or what I would label  
12      as a progressive piece of legislation.

13           And when I say "progressive piece of  
14       legislation," I want to clarify further that I'm  
15       talking about this in terms of a racially progressive  
16       piece of legislation.

17       Q. All right.

18           Now, Mae Ngai -- Ngai, spelled N-g-a-i, for the  
19       benefit of the court reporter -- writes in her book,  
20       Impossible Subjects, about the McCarran-Walter Bill,  
21       correct?

22       A. She does. Correct.

23       Q. And you're familiar with her work, correct?

24       A. Oh, I mean, if you've read my book, you know I  
25       cite her frequently.

1 Q. Yes.

2 A. By the way, thank you for the royalty.

3 But, anyway, go ahead and continue.

4 Q. You're very welcome. I don't know what that  
5 comes out to, but --

6 A. Like, \$0.75.

7 Q. Fair enough.

8 A. That would be a stick of gum these days.

9 Q. Right.

10 And in addition, in the summary of anticipated  
11 testimony that you provided for this hearing, you also  
12 referenced Ngai's work, correct?

13 A. That's true. Yeah.

14 Q. Is it correct that in her book, Ngai says  
15 that: "Preserving the national origins quota was not  
16 the central motivation for the McCarran-Walter Bill"?

17 A. Uh, I believe so.

18 I mean, if you want to read me that particular  
19 passage, you're welcome too. I don't know what page it  
20 appears on.

21 Q. Sure.

22 A. I, I didn't have a chance to reread all of  
23 Mae Ngai's 350-plus-page book before testimony this  
24 morning or on the lunch break. So, my apologies with  
25 my unfamiliarity with that specific passage.

1 Q. Yeah. That's okay.

2 Do you have a copy handy?

3 A. Right there.

4 Q. All right.

5 A. The good thing about working from your home  
6 office, slash, bedroom.

7 Anyway, go ahead.

8 Q. Does the phrase that I read to you appear on  
9 page 237 of the book?

10 A. Now I have to look old by taking off my glasses.  
11 I'm almost ready for bifocals at this point.

12 Okay. Yes. What paragraph are you referencing?

13 Q. Oh, boy. Um --

14 A. You didn't highlight it?

15 Q. I really should have.

16 All right. So, it's the first paragraph.

17 A. Are you talking at the top of page 237?

18 Q. Yeah. It's the first -- it's not a full  
19 paragraph, but it's the first paragraph. If you go  
20 four full lines up from the bottom, the sentence  
21 beginning with the word --

22 COURT REPORTER: Wait. Beginning with the  
23 word what?

24 BY MR. WALKINGSHAW:

25 Q. Does it say, "preserving the national origins

1 quota was not the central motivation for the Bill"?

2 A. It does say that.

3 Q. And does it continue, "maintaining the status quo  
4 hardly required such major review and revision of the  
5 code"?

6 A. That's true.

7 Q. And does it follow, "McCarran saw revision of  
8 the nation's immigration laws as a tool in the United  
9 States' urgent battle against communism"?

10 A. That's accurate. Yes.

11 Q. Is it fair to say that the 1952 law received  
12 political support for a variety of reasons?

13 A. Yeah.

14 Q. Earlier you referenced -- you were having  
15 discussion as to whether or not the Bill was racially  
16 progressive, and you referenced the elimination of the  
17 bar on Asian immigration, correct?

18 A. Uh, the elimination of the qualification under  
19 Johnson-Reed, that the only people who could utilize  
20 the quotas that were assigned to Asia, had to be people  
21 who could become citizens of the United States, which  
22 were not people of Asian descent at that point in time.

23 Q. Right.

24 And Secretary of State, Dean Acheson supported  
25 this Bill because it eliminated this provision, correct?

1       A. Uh, to my knowledge. Again, I haven't -- I --  
2 you could reference that specific passage, if you'd  
3 like. I won't claim to know that off the top of my  
4 head.

5       Q. Okay. It's on the following page, 238.

6       A. Okay.

7       Q. I promise we won't do much more of this.

8                   So, the second full paragraph, second paragraph:  
9 "Secretary of Dean Acheson..."

10      A. Yep.

11      Q. So that's where the sentence begins.

12      A. I got it.

13      Q. "Secretary of State, Dean Acheson, supported  
14 the McCarran-Walter Act because its elimination of the  
15 racial bar to citizenship, promises to resolve a, quote,  
16 serious irritant of longstanding in the U.S./Japanese  
17 relations," end quote.

18      A. Yeah.

19      Q. Would you agree with that? Would you agree with  
20 that statement?

21      A. Would I agree with the statement, or would I  
22 agree that that appears on page 238 of Mae Ngai's book?

23      Q. Well, let's take them in turn.

24                  Do you agree with the statement?

25      A. I agree with the statement that that is why

1       that particular individual supported that piece of  
2 legislation.

3       Q. Okay.

4               Now, the McCarran-Walter Bill was preceded by --  
5 you've mentioned in your prior testimony -- well, let me  
6 back up and I'll withdraw the question and I'll try to  
7 reframe it in a way that makes sense.

8               You've referenced in your prior testimony,  
9 reports that have been compiled prior to the passage  
10 of immigration laws, correct?

11          A. Yes. I have referenced a couple reports, as well  
12 as, I think, a couple academic works from the period of  
13 the 1950s.

14          Q. And there was one done prior to the  
15 McCarran-Walter Act, right, a report?

16          A. I mean, there were lots of reports done. Which  
17 one are you referencing? Are you talking about the, uh,  
18 the Wetback in the Lower Rio Grande Valley?

19          Q. No. I believe there was a comprehensive report  
20 that was about --

21          A. Are you referencing the Wickersham Commission  
22 report in 1931?

23          Q. I'm referring to the Senate judiciary  
24 Subcommittee report that ran about 900 pages.

25          A. Of what year?

1       Q. Well, I hate to break the book out again, but  
2 it's back on page 237 -- I promise this is the last  
3 one.

4       A. Well, at least we're only going between two  
5 pages here.

6       Q. So back to the first paragraph --

7       A. Yep.

8       Q. -- following the sentence that says: "McCarran,  
9 a conservative and devout Catholic from Nevada, was  
10 a dedicated anti-communist and, quote, warrior --"

11      A. Uh-huh.

12      Q. "-- but that 100-page report submitted by the  
13 subcommittee, and the accompanying 200-page draft  
14 omnibus Bill introduced by McCarran in 1950, and the  
15 legislation that Congress ultimately passed in 1952,  
16 have been considered most notable for their preservation  
17 of the national origins support system."

18      A. Okay. Yeah. It did preserve the national quota  
19 system, although it changed the references point to the  
20 census of 1920, I believe, instead of 1890, which was  
21 the reference for Johnson-Reed.

22      Q. So a few questions on that.

23           First, have you read that report that Ngai  
24 references at page 237?

25      A. I haven't read the 900-page report,

1 Q. Okay?

2 A. You know, if -- since you've read Handcuffs and  
3 Chain Link, you know that I don't go into a great  
4 amount of detail on McCarran-Walter, since it was, in  
5 the history of undocumented immigration, uh, this  
6 recodification in 1952 is something that is done very  
7 much without debate, as we've covered in my testimony.  
8 And so I did not read the 900-page report from the  
9 Judiciary Committee.

10 Q. Okay.

11 And the national origins quota system that that  
12 sentence that we read referenced, that's no longer a  
13 part of immigration law, correct?

14 A. Uh, it is. You don't get rid of national origins  
15 quotas until 1965.

16 Q. Right. I'm sorry. I mean, today, it's no longer  
17 part of -- like you said, the national origins quota  
18 system was eliminated in congressional legislation in  
19 1965, correct?

20 A. Yes.

21 Q. Right. So, today, if someone is trying to  
22 immigrate to the U.S., they're not subject to any  
23 quota with respect to their national origin, correct?

24 A. They are not.

25 Q. In fact, the 1965 Act included an explicitly

1 anti-discriminatory provision that banned consideration  
2 of national origin, ancestry, or race, correct?

3 A. That's true. That doesn't mean there were  
4 country level caps that were still imposed. There was  
5 a 20,000, uh -- 20,000 per year quota that was put on --  
6 that was applied to Mexico in 1976.

7 Q. All right.

8 I would like to shift perspective for a little  
9 bit to IRCA, if we could.

10 A. Okay.

11 Q. Well, if you think it's --

12 A. I love revisiting my first book, so --

13 Q. Got it.

14 So, again, you view this as a significant shift  
15 in the way that American law treated the, I guess what  
16 we could call the problem of undocumented immigration?

17 A. I mean, I think the way that I reference it in  
18 my book is that I think this represented the potential  
19 for a significant shift. You did see the first amnesty  
20 program that was part of the Immigration Reform and  
21 Control Act -- or, sorry, IRCA -- in 1986. And you did  
22 see some shifts in language at this point in time.

23 Q. Right.

24 With respect to the shifts in language, you wrote  
25 that: "The debate over IRCA differed significantly from

1       earlier debates on undocumented immigration in 1929,  
2       right?

3           A. That's correct. I mean, we would -- you know,  
4       we would hope that the debate on immigrations shifts  
5       from one that is, uh, strictly talking about the racial  
6       purity of the United States, to something different by  
7       the 1980s.

8           Q. And you reference in your book a floor statement  
9       by Representative Fish as expressing -- well, you  
10      believed "it was a feeling no doubt shared by many, that  
11      IRCA represented an opportunity to address immigration  
12      control in a way that was not driven by nativists or a  
13      reaction to the (unintelligible)," correct?

14           A. That's correct.

15           Q. You say that, "The floor statements reflected a  
16      significant shift from the way in which Mexican and  
17      undocumented immigration was discussed in the 1924 and  
18      the 1928 Acts," correct?

19           A. That's correct.

20           Q. I believe we've touched on this briefly, but  
21      IRCA did fail to reduce the influx of undocumented  
22      immigrants, correct?

23           A. Correct. You have the passage of an amnesty  
24      program, and then you have the beginning of the surge in  
25      undocumented immigration. And I forget -- I don't have

1       the charts in front of me. But you have a surge in  
2 undocumented immigration around the early part of the  
3 1990s, I believe.

4       Q. Okay.

5           And I'll throw out some numbers here that I've  
6 taken from your book. Let me know if you disagree with  
7 them.

8           After IRCA, the undocumented population dropped  
9 from 3.2 million in 1986, to 1.9 million in 1988,  
10 correct?

11          A. Yes. The size of -- the estimated size of the  
12 undocumented population -- and I want to be careful  
13 to clarify that language because by virtue of being  
14 undocumented, it is also a population that can be  
15 difficult to measure in terms of its full size.

16          Q. Right.

17          A. So those are the estimated size of the  
18 undocumented populations as represented in my book,  
19 yes.

20          Q. And by 1990, the estimated undocumented  
21 population had risen above three million, correct?

22          A. That's correct.

23          Q. And by 1996, the estimate had risen to five  
24 million, correct?

25          A. That's correct, based on whatever member -- or I

1 think, what really fancy chart that I have in there.

2 Q. Right.

3 1996 was when IIRIRA, the I-I-R-I-R-A was  
4 enacted, correct?

5 A. Correct.

6 Q. And you mention in your book a number of  
7 motivating factors. And I believe you reference a  
8 scholar named Don Johnson who identified them, but  
9 you refer to them in your book, correct?

10 A. I think so. I don't specifically remember  
11 Don Johnston, but --

12 Q. Okay.

13 So one of the things you mention is the failure  
14 of IRCA to stem the illegal immigration --

15 A. Right.

16 Q. The other was the passage of NAFTA?

17 A. Right.

18 Q. And that's the North American Free Trade  
19 Agreement?

20 A. That's correct.

21 Q. Which you write, "focused the public's attention  
22 on immigration and its effect on the U.S. economy,"  
23 correct?

24 A. Correct.

25 Q. You also reference the 1993 World Trade

1 Center bombing?

2 A. I have no -- I have no recollection of  
3 referencing that, but, um -- I don't know if you're  
4 referencing my dissertation or my book, but I don't  
5 recall that off the top of my head, and I don't  
6 recall the context for referencing that off the  
7 top of my head.

8 Q. Okay. You also --

9 A. My apologies for not recalling it, but when  
10 you -- you know, I have a little distance since that  
11 was written.

12 But, anyway, go ahead. Continue.

13 Q. If I e-mailed you a copy of your dissertation  
14 and pointed you to the page, would you be able to say  
15 whether or not it was fairly characterized?

16 A. If it appears in my book, I would be -- I think  
17 it is more relevant to the testimony that I'm offering  
18 today, since, again, my book went through the -- the  
19 manuscript submitted as my dissertation went through  
20 multiple rounds of peer review before being released as  
21 my book; and, therefore, as a dissertation is not what  
22 I can -- is not a publication, nor is it something that  
23 I would consider a final version of my work. That is,  
24 essentially, a draft version. That is a dissertation,  
25 but it is not a publication.

1 Q. Okay.

2 It's hard to e-mail it to you since there's a  
3 digital copyright provision for the benefit of your  
4 royalties. Maybe we'll just move along.

5 A. Well, I mean, I have my book, but I don't -- I  
6 don't get any royalties from my dissertation --  
7 although, you know, if you want to send me \$0.75, I'll  
8 take it.

9 Q. Sure.

10 So you do have a copy of your book?

11 A. Yeah. Somewhere.

12 Q. Okay. So the phrase that I'm referring to does  
13 appear in your book.

14 A. Okay.

15 Q. The sentence --

16 A. Hold on one second. Let me pull it up.

17 Q. You have it --

18 A. I also have a pdf of it.

19 Q. Okay.

20 A. So, uh -- and my apologies to -- my camera --  
21 give me one second. I just lost my monitor, so --

22 MS. GORMAN: Personally, I'm losing a thread  
23 because I don't know what people are referring to. If  
24 somebody could share a screen, or if Mr. Walkingshaw  
25 could share his screen so I can -- I'm trying to --

1                   MR. WALKINGSHAW: I will try. I have the  
2 Kindle version of the Professor's book, which was cited  
3 in the motion. Let me see if I can find a way to share  
4 my screen.

5                   Can you Control F in your pdf?

6                   Oh, dear, we lost his video.

7                   THE WITNESS: Yes. Give me one second.

8 I'm trying to correct my video. My monitor cut out.

9 I'm trying to do a quick fix on that, but I can still  
10 hear you. Hold on.

11                  Okay. What am I -- what page did you  
12 reference?

13 BY MR. WALKINGSHAW:

14 Q. So it's hard with the Kindle version because it  
15 doesn't have pages, but if you can search within the  
16 document for the phrase "the 1993 bombing."

17 A. Let's see.

18 Q. I'm afraid I'm unable to share my screen.

19 A. And I'm down a monitor.

20 Um, yes, "the 1993 bombing of the World Trade  
21 Center by" -- whoop. Am I getting it back now?

22 Q. Yes.

23 A. Now it's over here.

24 Okay. Let me just switch this over real quick,  
25 and then I'm looking at the right screen.

1                   THE CLERK: Mr. Walkingshaw, give it a try  
2 now to try and share your screen.

3                   MR. WALKINGSHAW: All right. One moment.

4                   THE WITNESS: Okay. I can read the passage  
5 if you'd like, since I have it right here.

6                   MR. WALKINGSHAW: Sure. That would be  
7 great.

8                   THE COURT: Well, before you do that, I'm  
9 just trying to -- he's sharing the screen?

10                  MR. WALKINGSHAW: I'm sorry, Your Honor. I  
11 can take it down if it's preferable.

12                  Did Your Honor have a question?

13                  THE COURT: I'm trying to understand this  
14 line of questioning. You're asking if Professor  
15 Gonzalez O'Brien referenced the 1993 bombing of the  
16 World Trade Center?

17                  MR. WALKINGSHAW: As a driving factor for  
18 the passage of the 1996 IIRIRA Act.

19                  THE COURT: And I think that the answer  
20 earlier was that he wasn't sure if he did. And that's  
21 what you were trying to demonstrate, is that it was  
22 referenced?

23                  MR. WALKINGSHAW: Yes. That he identified  
24 it as one of the driving factors of the passage of  
25 IIRIRA.

1                   THE WITNESS: If I may offer a point of  
2 clarification. I mean, all of this that is cited in  
3 that paragraph, both the North American Free Trade  
4 Agreement and the bombing of the World Trade Center,  
5 is talking about the environment at the time  
6 preceding the passage and the debate other the  
7 Illegal Immigration Reform and Immigrant Responsibility  
8 Act, or IIRIRA, or I-eera (phonetic), or however --  
9 whatever we're calling it right now. So, I -- what  
10 is your -- what is your question relating to that  
11 particular passage?

12 BY MR. WALKINGSHAW:

13 Q. So you have identified the World Trade Center  
14 bombing as an event that made the passage of this Bill  
15 more likely, correct?

16 A. It was an event, at least the identification  
17 of the individual, the suspect in that case as someone  
18 who was believed to be an immigrant, did heighten public  
19 fears around immigration, I think is the point that I'm  
20 making there.

21 Q. Okay.

22 And you also reference in your book -- I believe  
23 you referenced this on direct -- a statement by John  
24 Doolittle during the debates over IIRIRA, regarding a  
25 drive-by shooting in his district where the perpetrator

1 was an undocumented alien. He served his sentence.

2 And then he was back within one week after he was

3 deported.

4           Correct?

5       A. Correct -- well, I don't know that I referenced  
6 it that explicitly, but I did mention it in passing.

7 Yes.

8       Q. Right.

9           And I believe you also referenced a statement  
10 by an Iowa legislator who referred to a stabbing by  
11 a previously deported, undocumented immigrant at a  
12 party, correct?

13      A. Correct.

14      Q. Okay.

15           I will try and cease sharing my screen at this  
16 point. I think we've more than --

17           Or, Peggy, have I stopped sharing my screen?

18           THE CLERK: You have.

19           THE WITNESS: You're good.

20           MR. WALKINGSHAW: Okay.

21 BY MR. WALKINGSHAW:

22      Q. You teach immigration and border politics,  
23 correct?

24      A. Uh, I have. Yes.

25      Q. Yeah. And at Highline -- I'm sorry. Is it

1       Highline College or University?

2           A. It's Highline College. It's a community college  
3       in Washington, where I was before taking the job at  
4       San Diego State.

5           Q. You taught comparative government there, correct?

6           A. Yeah. I mean, at a community college, you teach  
7       whatever classes they tell you to teach because there  
8       are only four classes that are offered.

9           Q. Gotcha.

10          And it's true --

11         A. Actually, as a point of clarification, I did not  
12       teach immigration and border policy at Highline. I  
13       taught a racial and ethnic politics class, I believe.  
14       But I don't recall teaching an immigration and border  
15       policy class.

16         Q. Oh, I'm sorry. I don't believe that I said at  
17       Highline, but have you taught immigration and border  
18       politics generally.

19         A. Yes. Yes.

20         Q. Okay.

21           And at Highline you did teach comparative  
22       government, even though it's, perhaps, one of only  
23       four classes that they offer in political science?

24         A. It is. And if you're going to ask me questions  
25       regarding comparative government, that is not one of

1 the areas of my expertise, so, uh -- I, I am happy to  
2 say I taught that class, based on my limited expertise  
3 in comparative government, but it is not one of my areas  
4 of specialization.

5 Q. Okay.

6 Do you know if other countries around the  
7 world criminalize entry to their borders without  
8 authorization?

9 A. Some do. There is a wide range of immigration  
10 policies worldwide in regards to undocumented entry,  
11 and there's a wide range of policies that are used by  
12 countries to address it. And I think, also, uh, to  
13 give that question a little additional context, you also  
14 have to look at not only the penalties for entry, but  
15 the opportunities for normalization of status after  
16 that, um, initial act of undocumented entry. And some  
17 countries do provide more opportunities to normalize  
18 status than the United States does. Although, again,  
19 I'm not an expert in comparative government, nor is that  
20 the area that I write in.

21 Q. Right.

22 But, isn't it true that a substantial majority of  
23 countries around the world criminalize entry into their  
24 borders without authorization?

25 A. Are you planning on citing a specific number?

1 Because I don't know what would -- I don't know that  
2 I can say that a majority do, without looking at the  
3 immigration policies of all of the individual countries  
4 in the international system, and also then having a  
5 debate around what you would identify as "criminalize  
6 undocumented entry."

7 Q. Okay.

8 So, fair to say you don't know then?

9 A. I know that immigration policies from country  
10 to country vary in how they treat undocumented entrants.

11 Q. But, you don't know whether or not a majority  
12 or minority of those policies include a criminal penalty  
13 for entry into the country without authorization?

14 A. I don't. If you've quantified that, I would love  
15 to see a chart. I can use it in my classes.

16 Q. I'm scared to do more screen sharing, and so  
17 perhaps I'll just move on.

18 So, I think I only have a little more. I would  
19 like to ask you some questions about the term -- the  
20 term "wetback."

21 A. Uh-huh.

22 Q. You discussed it in your direct testimony,  
23 correct?

24 A. That's correct.

25 Q. And it's not the first time you've been asked to

1 provide expert testimony on the meaning of its -- on the  
2 meaning of that term, correct?

3 A. Uh, that's correct.

4 Q. Right.

5 You've testified in a hearing last week in Oregon  
6 on the same subject, correct?

7 A. Yeah. I testified -- I mean, you know, my  
8 testimony was not just to define the term "wetback,"  
9 but --

10 Q. That's true.

11 A. -- but I believe I did offer -- that testimony  
12 was partial testimony that was then cut short. So my  
13 recollection of what exactly I discussed over the course  
14 of that testimony is, um, is a wee bit foggy in terms  
15 of where the stopping point was.

16 Q. Okay.

17 This happened last Thursday, right?

18 A. To my recollection, yes.

19 Q. Right.

20 And I mean --

21 A. I mean it's COVID time so, you know, everything  
22 kind of ebbs and flows, and days of the week lose their  
23 meaning. But, yes, Thursday.

24 Q. Sure.

25 And it was for a hearing on a motion very much

1 like this one, correct?

2 A. That's correct. Yeah.

3 Q. I mean, can you think of any differences, aside  
4 from the district and the defendant, from the two  
5 motions that you're aware of?

6 A. Not off the top -- I mean, I would have to look  
7 at them side by side.

8 Q. Right.

9 A. I mean, I'm not going to pretend to have a  
10 perfect recollection of both motions as were filed.

11 Q. Sure. But, you know, nothing major pops out  
12 to you?

13 A. They're similar motions based on my recollection  
14 of the two.

15 Q. Okay.

16 A. Again, how similar they are and how -- in terms  
17 of the actual text offered, I don't feel like I can  
18 confidently say.

19 Q. Okay.

20 You were asked at that hearing to discuss the  
21 meaning of the term "wetback" as it was used in the  
22 early 1950s, correct?

23 A. Uh-huh. Correct.

24 Q. And in response, you stated, "The term was used  
25 largely to denote anyone who had entered the United

1 States illegally," correct?

2 A. Correct.

3 Q. You stated that, "The term was used rather  
4 broadly without any kind of national designation,"  
5 correct?

6 A. Correct. Meaning, you know -- by which I meant  
7 -- and I'm not sure if you're going to offer this  
8 part of my testimony either, or if this was part of  
9 my testimony -- but in terms of this being a designation  
10 made solely to Mexicans versus anyone from, say,  
11 Central America, who also crossed illegally, that  
12 term would have been applicable to them as well.

13 Q. All right.

14 And it refers, exclusively, to people in the  
15 country without any documented status, correct?

16 A. The term "wetback" does. Yes.

17 Q. Right.

18 And, again, the term originates from -- I believe  
19 you covered that in your direct testimony.

20 Are you familiar with Cesar Chavez?

21 A. No. I've never heard of him before -- yeah.

22 Q. Okay.

23 Uh, he was a Mexican-American labor organizer,  
24 correct?

25 A. Yes.

1           Yeah, and I already know where you're going with  
2 this, but continue.

3           Q. Okay. Well, let's get there and then I think we  
4 should -- ought to be done.

5                 He was considered a civil rights hero for many  
6 Mexican Americans, correct?

7           A. Correct.

8           Q. And in fact, in the 1950s and '60s and '70s,  
9 isn't it true that Cesar Chavez, himself, referred to  
10 undocumented strikebreakers who were in the country  
11 illegally as wetbacks?

12          A. That's true.

13          Q. Okay.

14                 And he wasn't referring to Mexicans in general,  
15 was he?

16          A. He was drawing a distinction between legal  
17 Mexicans and illegal Mexicans.

18          Q. Right.

19                 You wouldn't say that Cesar Chavez bore a racial  
20 animus against Latinx people, would you?

21          A. I would not.

22          Q. Okay.

23                 MR. WALKINGSHAW: Those are all the  
24 questions I have at this time.

25                 So, at this point, Your Honor, I'd pass

1 the witness.

2 **REDIRECT EXAMINATION**

3 BY MS. GORMAN:

4 Q. So, Professor, that covered a lot. Most of which  
5 I have not read. But just to be -- to be very clear,  
6 when you're referring to -- because I, likewise,  
7 listened to your testimony last week in the District  
8 of Oregon -- is it fair to say you testified for several  
9 minutes and then time ran out?

10 A. That seems accurate. Again, I don't remember  
11 the exact number of minutes, but I didn't testify for  
12 very long. I was having unfortunate audio issues, which  
13 I've since addressed with this neat little thing right  
14 here.

15 Q. Is there a difference in the use of, of a racial  
16 -- of what could be a racial slur for one group, and not  
17 for another group?

18 A. I think there is.

19 Q. As in -- okay.

20 A. I think to contextualize my answer to the  
21 previous question about Cesar Chavez, and about, uh,  
22 the positions of some Mexican Americans, more broadly,  
23 in regards to the undocumented population or to  
24 wetbacks, uh, Mexicans in the United States have  
25 long had issues with their own status. And so there

1 are some divisions that you see, both at the time that  
2 was referenced earlier in regards to Cesar Chavez,  
3 but I also think there are -- there continue to be  
4 some division on this question -- or on the issue of  
5 undocumented immigration because, as I mentioned,  
6 with -- as I mentioned with that 1951 report on the  
7 wetback in the Rio Grande Valley, this attribution of  
8 inferiority and criminality to the wetback was seen by  
9 Mexican Americans as something that was generalized  
10 to them as well -- because it was generalized to them.  
11 And again, that is what I mean by this is a racialized  
12 term. This is a term that was used to characterize  
13 people who appeared as if they could be undocumented,  
14 regardless of their actual legal status or citizenship.  
15 And so there, there is some -- there is some necessary  
16 nuance to that.

17 Q. And is it true that when you talk about Operation  
18 Wetback, that actually included both Mexicans who had  
19 legally entered the country and Mexicans who had entered  
20 without permission?

21 A. That's correct.

22 Q. And, you know, you were left with this sort of  
23 question about Cesar Chavez, and you touches on, I  
24 think, something very -- an important part of that  
25 history, which we didn't go into too deeply, but is

1       it your understanding since Cesar Chavez was very much  
2       a, uh, an advocate of worker's rights in general, humane  
3       treatment of workers?

4                  Is that fair?

5                  A. Yes.

6                  Q. And during periods in American history, were  
7       undocumented and Braceros actually used to break strikes  
8       by agricult -- by farm interests and farm owners?

9                  A. That's correct.

10                 Q. And I want to make sure, if there's any  
11       additional context that you wanted to add to that,  
12       uh, you know, feel free to. But those are just, sort  
13       of, points that I noticed from the government's  
14       cross-examination.

15                 Was there anything further regarding that  
16       terminology?

17                 A. Yeah.

18                 So, uh -- so, you know, there -- again, there  
19       were -- there has been, to a certain extent, this  
20       playing off of the undocumented population and the  
21       either legal Mexican population or Latino population,  
22       and American citizens, and these tensions between  
23       groups because, again, Mexican -- undocumented Mexicans  
24       could be used as strikebreakers. They were seen as  
25       contributing to notions of racial inferiority of

1       Mexicans generally; essentially, of giving Mexican  
2       Americans a bad name. And so the context of  
3       undocumented immigrants, and the context of the  
4       term "wetback" and/or "illegal immigrant," has to be  
5       understood through the lens of both how white America  
6       interpreted those terms, but also how those were used  
7       to categorize not just the immigrants, not just those  
8       who were here without status, but to characterize an  
9       entire group of people. Because at the end of the  
10      day, that was -- those were racial attributions.  
11      There was no way for anybody to tell if somebody  
12      was undocumented or legal or a citizen of the United  
13      States. And a lot of the activity on the part of  
14      Mexican Americans, or legal Mexicans, and a lot of  
15      the hostility toward some of the undocumented community,  
16      was because there was a fear that that would be  
17      generalized to the Mexican population as a whole, and  
18      that would further lower the status of Latinos in the  
19      United States as a group.

20           Q. You know, another point that you had hat I  
21      think was brought to your attention, was the use of  
22      anecdotal testimony in congressional debates. I  
23      want you to comment further about the use of these  
24      anecdotal -- of these anecdotes by lawmakers of violent  
25      crimes committed by undocumented immigrants, to further

1       a general anti-immigrant agenda, and whether or not that  
2       is intentioned with the empirical literature or not.

3           A. Yeah. So what you see sprinkled throughout the  
4       congressional debate, you know -- and I go into this  
5       quite a bit with the Illegal Immigration Reform and  
6       Immigrant Responsibility Act, or IIRIRA, but what you  
7       see is you see these instances, the use of the example  
8       of the drive-by shooting, uh, these anecdotal instances  
9       of criminality -- which this, again, you know, I'm not  
10      downplaying the severities of that criminal behavior,  
11      or the impact that that had either on the victims or  
12      their families -- but that is essentially being used  
13      in a way to characterize an entire population, when  
14      the empirical support for immigrant criminality is  
15      lacking, and when all contemporary examinations of  
16      the criminality of illegal immigrants or undocumented  
17      immigrants has found that undocumented immigrants  
18      actually offend at lower rates than the native born  
19      population. And this is not something that was unknown,  
20      even during the -- um, if I can pull this up for a  
21      second, which I can't -- even during the debate of  
22      McCarran-Walter, there was a correction on the part  
23      of Representative Celler, when another member of  
24      Congress -- and this is not specifically in reference  
25      to Mexicans, but it is in reference to the kinds of

1 ideas that the foreign born are more inclined toward  
2 criminality -- and Representative -- and Celler notes  
3 that what you find, and what the FBI found -- and this  
4 is in 1952 as well -- is the native born offend at  
5 higher rates than the foreign born. And this is  
6 something that's been replicated over and over again  
7 in multiple academic studies and, as I mentioned, in  
8 numerous governmental publications and reports. And,  
9 yet, you continue to see it referenced.

10 You saw it referenced in the -- in the 1996, uh,  
11 legislation during debate. You also saw it referenced,  
12 repeatedly, on the push on the part of President Trump  
13 to crack down on sanctuary cities and things like this,  
14 these references to tragedies; but, ultimately, to  
15 anecdotal evidence of criminality on the part of the  
16 undocumented population.

17 And, again, the criminality that we know tends  
18 to be more, more generalized towards all people who look  
19 like they could be undocumented immigrants because,  
20 again, that term is a racialized one, and remains a  
21 racialized one in this country.

22 Q. The fact that -- I mean, there were the two,  
23 sort of, notable examples, or several during that  
24 administration, which I don't know if you're familiar  
25 with, but one involved -- I think the first name of the

1 young woman might have been Mollie -- and her parents  
2 came out and said don't use this tragedy to further a  
3 racist agenda.

4 Do you recall, sort of that -- I understand this  
5 post-dates this litigation, but --

6 A. Right. That was -- yeah, that was the murder  
7 of Mollie Tibbetts in, I believe, in Iowa, by an  
8 undocumented immigrant. And this was picked up  
9 as an example of the threat posed by undocumented  
10 immigration, in much the same way that, Kathryn Steinle,  
11 or Kate Steinle's death in San Francisco in 2015 was  
12 used as an example of the threat posed by immigrant  
13 criminality. And this is something -- sorry. I'm  
14 moving my web cam. I'm having -- there we go -- this  
15 was something that you see referenced -- you see  
16 referenced repeatedly in regards to both Mollie  
17 Tibbetts, and Kathryn Steinle, but it was also something  
18 that was part of Trump's general push in his campaign.  
19 He brought the families of victims of undocumented  
20 crime, he brought them on his campaign tour. He had  
21 them tell their story.

22 And, again, I am not saying these are not  
23 tragedies, but this is -- the political reason for  
24 this is it activates longstanding racial anxieties  
25 in this country regarding nonwhite peoples, and

1 specifically Latinos.

2 THE COURT: All right. I forget --

3 THE WITNESS: And at the same time --

4 THE COURT: I'm sorry to interject. I  
5 forget what the original question was now and why we're  
6 down this line of questioning.

7 Ms. Gorman, would you redirect.

8 MS. GORMAN: Well, I think we can end it.  
9 I think that the general point was -- that I was  
10 at least attempting to conceptualize, was that  
11 Mr. Walkingshaw had referenced this part of his  
12 cross-examination, these anecdotal stories of violent  
13 acts committed by undocumented immigrants, and to place  
14 that in the context that those -- that these, sort of,  
15 anecdotal pieces of evidence have sort of a long history  
16 of being used to justify ultimately racists laws or  
17 racist enforcement of laws, either facially neutral or  
18 racially motivated laws.

19 THE COURT: All right. Do you have any more  
20 in terms of your recross -- redirect, I mean?

21 MS. GORMAN: I will mercifully say no,  
22 other than, um -- yeah, I think I've -- I think we've  
23 exhausted this.

24 And I guess just to be clear, there  
25 was a lot of talk about IRCA, and I think -- and maybe

1 I misunderstood, but I guess it's my understanding, and  
2 correct me if I'm wrong, but there was no amendment or  
3 change to 1326 in IRCA, is that --

4 THE WITNESS: No, there was not.

5 MS. GORMAN: Okay. So I think I  
6 was confused by the testimony regarding IRCA  
7 because -- okay. That makes more sense then.

8 And, Your Honor, I don't know if this court had  
9 additional questions or if we covered everything.

10 THE COURT: Mr. Walkingshaw, do you have  
11 more?

12 MR. WALKINGSHAW: Your Honor, I don't  
13 have any further questions, but I would ask the Court  
14 for the opportunity to submit the transcript from  
15 Professor Gonzalez O'Brien's testimony in the hearing  
16 in Oregon on Thursday. Obviously, it's only five days  
17 ago, so that transcript hasn't been prepared yet. But,  
18 I think the Court should have the benefit of being able  
19 to look at what Professor Gonzalez O'Brien said in that  
20 proceeding because I believe there's some disagreement  
21 between the parties as to what happened there.

22 MS. GORMAN: And Your Honor, just if it  
23 might help, I know that his testimony is going to  
24 continue tomorrow in that proceeding, so we may just  
25 want to get the transcript as a whole. And I'm happy

1 to looking into providing that too.

2 THE COURT: I'll address the post-hearing  
3 issue in a moment. I have some follow up questions for  
4 Professor Gonzalez O'Brien. And I may be jumping around  
5 just a little.

6 Going back to your testimony from before  
7 the break, where you indicated there was justification  
8 for the codification of Section 1326 in the 1952 Act,  
9 I believe, I thought you testified that the  
10 McCarran-Walter Act itself did not contain any  
11 discussion of Mexican entry into the United States  
12 because that was not part of that Bill, but there  
13 was continued attributions of criminality to illegal  
14 immigrants. And as evidence of that, you referenced  
15 the utilization of the term wetbacks to describe  
16 undocumented immigrants as Mexicans.

17 Is that -- am I --

18 THE WITNESS: Correct.

19 THE COURT: -- summarizing all that  
20 correctly?

21 THE WITNESS: Yeah. Um, and, you know,  
22 what I was referencing with the term "wetback," is if  
23 you look at the debate over McCarran-Walter, at least  
24 the debate that I've read over McCarran-Walter, uh, you  
25 don't really see that come up. That was a letter that

1 was -- that was put into the Congressional Record  
2 in support of certain changes to the McCarran -- under  
3 the McCarran-Walter, including some changes in language  
4 to 1326. And that was from Peyton Ford, the Deputy  
5 Attorney General, on behalf of the DOJ. And in that  
6 document, the term "wetback" is referenced.

7 But, again, in the McCarran-Walter debate,  
8 broadly, most of the conversation is about the national  
9 origins quotas, and about legal immigration into the  
10 United States. And you actually don't see Mexicans  
11 referenced in the, kind of, broad congressional debate,  
12 outside of this kind of throw away reference -- or not  
13 throw away -- to this reference in the AG's, the deputy  
14 AG's letter. But, my understanding and my read of  
15 the congressional debate over McCarran-Walter is that  
16 Mexicans just didn't come up.

17 MS. GORMAN: Your Honor, just to be -- for  
18 clarification, in terms of McCarran-Walter, Mexico was  
19 among the countries, when we're talking about legal  
20 immigration, that was discussed in McCarran-Walter.

21 I just want to make a distinction between  
22 1326 and, sort of, the Western Hemisphere quota --

23 THE WITNESS: Right.

24 MS. GORMAN: -- generally.

25 So I don't know if that provides -- at

1       least, for me, that provided some clarification. I  
2       don't know if that (unintelligible).

3                   So Mexico was part of the conversation in  
4       McCarran-Walter in terms of just the overall sort of  
5       quota and system. But with respect to illegal, or  
6       with respect to 1326, that was what was the minimally  
7       discussed provision in McCarran-Walter.

8                   Is that a fair characterization?

9                   THE COURT: I'm sorry. Are you asking --

10                  THE WITNESS: Are you asking me?

11                  THE COURT: -- Professor Gonzalez O'Brien a  
12       question now?

13                  MS. GORMAN: Yeah.

14                  THE WITNESS: Yeah. And most of the  
15       discussion under McCarran-Walter is about, uh, the --  
16       you know, the re-constitution of the natural origins  
17       quotas, Asian immigration, and some of the issues that  
18       were taken with the designation of Asian ancestry,  
19       as what determined your -- what quota you could apply  
20       to --

21                  THE COURT: I do see that --

22                  THE WITNESS: (Unintelligible).

23                  THE COURT: I'm sorry.

24                  I do see that as a different issue and  
25       I'm not asking questions about that. So, I understand

1 that context.

2 MS. GORMAN: I just wanted to be sure that,  
3 yeah, the testimony wasn't characterized that Mexico was  
4 not discussed at all. I think I just wanted to make  
5 sure that that was clear.

6 THE COURT: So then after the lunch break,  
7 when you opined that the codification was motivated, in  
8 part, by racial animus, you identified several reasons  
9 for you reaching that conclusion. And I believe you  
10 testified that even though there was -- it was codified,  
11 there was no debate on the -- and I'm quoting -- overt  
12 problematic aspects of the original enactment of the  
13 statute in 1929. And also there was no debate over  
14 the merits of the Act because it was in effect for -- I  
15 don't want to do the math -- between 1929 and 1952. For  
16 a lengthy period of time --

17 THE WITNESS: Correct.

18 THE COURT: -- as to whether or not the  
19 statute serves important policy.

20 So I guess my question is, all that may be  
21 good, while it may be good to have, kind of, a policy  
22 examination, I don't know that the absence of that  
23 suggests any racial animus. So my question for you  
24 is if you're aware of other instances where Congress  
25 re-codified a statute and did do so with robust debate

1 over what may have been overt problematic aspects of  
2 the original enactment.

3 Do you have an example.

4 THE WITNESS: Well, we see that debate with  
5 the McCarran-Walter Act, I mean the debate over national  
6 origins, and the kind of racial aspects of the, of  
7 the limits placed on quotas for southern and eastern  
8 Europeans. You see that in 1965 with debate over the  
9 Hart-Celler Act, and the elimination of national quotas,  
10 and the acknowledgement that the national quota system  
11 had been one that was very clearly and explicitly meant  
12 to privilege certain groups based on perceptions of  
13 superiority and inferiority, particularly -- you  
14 know, especially with 1924. But, also, you see the  
15 continuation of that with the McCarran- Walter Act,  
16 and the insertion of tables during committee testimony,  
17 the insertion of tables showing that the largest quotas  
18 will still go to northern and western Europeans.

19 So, I think you certainly see that debate.  
20 And you see that debate in regards to the quotas that  
21 were applicable to the age of specific triangle under  
22 McCarran-Walter. And so that debate occurs. And I  
23 think that's one of the -- you know, that's one of  
24 the reasons that I'm willing to say that this is a  
25 demonstration of racial -- of continued racial animus,

1 is that you're acknowledging in the debate over  
2 the McCarran-Walter Act, members of Congress are  
3 acknowledging that there are problematic racial aspects  
4 to the 1924 Johnson-Reed Act, which comes five years  
5 before the Undesirable Aliens Act, and yet they choose  
6 to not only recodify the 1326, but to recodify it, uh,  
7 without any examination.

8 THE COURT: Was there support for the  
9 recodification or the codification of Section 1326?

10 I guess I would charact -- is it correct  
11 to characterize it as a codification? Because 1326 as  
12 a statute, Section 1326 was really codified in 1952,  
13 right?

14 So, my question is was there support for  
15 that recodification of Section 1326 during the debate  
16 in 1952?

17 THE WITNESS: I did not come across -- in  
18 my reading of the debate over the McCarran- Walter Act,  
19 I did not come across any specific references to  
20 either the -- you know, regardless of whether we're  
21 characterizing it as a codification or recodification  
22 of 1326, it was just not debated, at least in what I  
23 have, uh -- what I have come across, and based on my  
24 reading of the Congressional Record.

25 THE COURT: So would it be fair to say it is

1 not clear that there was any particular groups  
2 that supported or opposed the codification of  
3 Section 1326 in 1952?

4 THE WITNESS: There was no specific, uh --  
5 there was no specific mention of it, again, outside of  
6 some changes to the language that were suggested by  
7 Peyton Ford in that letter. Again, based on my reading  
8 of the Congressional Record, there was no significant  
9 debate over 1326.

10 MS. GORMAN: Your Honor, may I ask a  
11 follow-up question?

12 THE COURT: You may when I'm finished.

13 Hang on.

14 Are you familiar with the ways in which  
15 Section -- the statute changed, from 1929 to 1952, in  
16 terms of the criminalization of re-entry?

17 THE WITNESS: The language was changed a  
18 little to allow for people who were apprehended outside  
19 of -- I believe. I would have to refer to the specific  
20 language again -- but I believe that people who were  
21 apprehended outside of instances of the Act of the area  
22 that they had initially entered, illegally entered. And  
23 this was largely aimed at immigrants that had preceded  
24 into the interior of the United States and were -- to  
25 ease prosecutions of those individuals because, um, I

1 think as something that was mentioned in earlier  
2 testimony, visa overstays and things like that had not  
3 been criminalized in the same manner that the Act of  
4 undocumented entry has been criminalized, and so the  
5 language to that has been adjusted. But, you know,  
6 I'm -- based on my recollection of reading both  
7 1929 and the final codification in 1929, and the  
8 recodification then of 1326, as well as the 1326 as  
9 it exists today, the differences are not wildly  
10 significant in the, in the changes in language.

11           But, again, I would have to say that, uh,  
12 with complete confidence, I would actually have to  
13 refer to those statutes.

14           THE COURT: That's why I asked if you're  
15 familiar because I didn't compare the statute. That  
16 was a foundational question as to your familiarity,  
17 and it sounds like you're not entirely -- you may be  
18 familiar, but you're not -- you don't entirely recall  
19 the difference between the two. And I think that's  
20 fair.

21           Ms. Gorman, do you have follow-up questions?  
22 I don't have any further questions for Professor  
23 Gonzalez O'Brien. Do you have any?

24           MS. GORMAN: I do.

25           So, Professor Gonzalez O'Brien, you have

1 made -- you know, I want to be clear when we say, in  
2 terms of what it means to debate something, versus  
3 what it means to explicitly choose to carry something  
4 forward.

5 So, is it your understanding that  
6 explicitly, in 1952, there was an affirmative decision  
7 made by that legislative body, to carry forward the  
8 1952 Act of illegal re-entry?

9 THE WITNESS: Yes. I mean, they chose to,  
10 you know, to codify or recodify what had been passed in  
11 1929. And that was part of the legislation, and members  
12 of Congress are responsible for knowing what is in the  
13 Bills that they're voting on.

14 MS. GORMAN: So is there also -- and  
15 you had gotten some questions from chief Judge Du  
16 regarding -- and I'll refer to it as the "found-in  
17 language." So to the extent that this Bill was --  
18 there was a decision to carry it forward, was there --  
19 then there was this adoption of the found-in language  
20 at the suggestion of the Deputy Attorney General?

21 Is that fair?

22 THE WITNESS: That's fair.

23 MS. GORMAN: And that adoption was  
24 explicitly to make it easier to enforce the 1929 law,  
25 by allowing prosecution of immigrants wherever they

1       were found, even if you couldn't establish where they  
2       crossed.

3                   Is that your understanding?

4                   THE WITNESS: That's correct. That's my  
5       understanding. Yes.

6                   MS. GORMAN: And so I just want to be  
7       very clear that the -- you know, the Congressional  
8       Record, at least in Walter -- in McCarran-Walter, is  
9       not silent on the point of illegal re-entry.

10                  And then to just sort of reiterate that  
11       one of the contexts of this sort of lack of, I guess,  
12       robust debate, stands in contrast to robust debates  
13       about other aspects of legal immigration.

14                  Is that fair?

15                  THE WITNESS: That's fair. And other  
16       racialized aspects of immigration.

17                  MS. GORMAN: And part of the legislative  
18       background also is the Wetback Bill that occurred two  
19       months earlier.

20                  Is that fair?

21                  THE WITNESS: That is fair.

22                  MS. GORMAN: And the Wetback Bill explicitly  
23       carved out from the harboring of aliens employers?

24                  THE WITNESS: That is correct.

25                  MS. GORMAN: And that tension between

1 employers and the utilization of south of the border  
2 migrants was the same sort of tension that we see  
3 animating that debate in 1929.

4 Is that fair?

5 THE WITNESS: That's fair.

6 THE COURT: Ms. Gorman, have you concluded  
7 your follow-up questions?

8 MS. GORMAN: I think so, Your Honor.

9 THE COURT: Mr. Walkingshaw, do you have  
10 any follow-up questions based on the questions I  
11 asked and the additional questions that Ms. Gorman  
12 asked?

13 MR. WALKINGSHAW: No, Your Honor.

14 Thank you.

15 THE COURT: All right.

16 In terms of post-hearing briefs, let me  
17 first address the question that Mr. Walkingshaw asked  
18 about submitting Professor Gonzalez O'Brien's -- the  
19 transcript of his testimony in a hearing, I assume  
20 before the District of Oregon, on a similar motion to  
21 dismiss a Section 1326 Count.

22 I don't want testimony for the sake of  
23 testimony. So if you believe that Professor Gonzalez  
24 O'Brien testified -- that the testimony somehow is  
25 pertinent to his testimony today in terms of what's

1 offered, or in terms of credibility or inconsistency,  
2 I'll allow it. So, you can file it in your post-hearing  
3 briefs, submit the transcript, and point out what I  
4 should focus on. I don't want the testimony to be the  
5 same testimony that I've heard already in this case.

6 MR. WALKINGSHAW: (Nodding head  
7 affirmatively.)

8 THE COURT: I would assume that much of --  
9 there will be much overlap because the issue is the  
10 same. Not that it's not very interesting, but I don't  
11 need the records to be redundant. So that's -- so to  
12 the extent that you find that the testimony offered in  
13 the other case will be somehow relevant for -- on the  
14 issues raised or pertinent to determine credibility, I  
15 will permit it.

16 And so if you need additional time because  
17 Professor Gonzalez O'Brien is expected to testify  
18 again on Thursday, then I will set the deadline for  
19 post-hearing briefs to be submitted, and then I'm  
20 going to close the briefing period so I can make a  
21 decision on the motion.

22 So how much time do the parties think you  
23 need to submit post-hearing briefs?

24 MR. WALKINGSHAW: Uh, well -- I'm sorry --  
25 if Ms. Gorman --

1                   THE COURT: That's all right.  
2 Mr. Walkingshaw, you can go ahead and tell me since  
3 you were the one that asked for post-hearing briefs.

4                   MR. WALKINGSHAW: Thank you, Your Honor.

5                   So we can order -- I do believe that  
6 having the transcript from this hearing is important  
7 to properly focus and present the issues. We can order  
8 that on an expedited basis and I believe that will take  
9 one week to arrive. Although, I don't know if Kathy is  
10 in the room, she might be able to tell me otherwise.  
11 But, I do think we will need a one week delay for  
12 purposes of receiving that transcript.

13                  I will order the Oregon transcript as soon  
14 as possible. I assume it won't take any longer.

15                  If Ms. Gorman -- I don't plan on submitting  
16 anything on testimony going forward in the Oregon  
17 hearing, but if Ms. Gorman would like to that, I  
18 believe -- and perhaps Professor Gonzalez O'Brien  
19 can correct -- can let us know as far as scheduling,  
20 but I believe that's scheduled to resume tomorrow. But,  
21 what I would suggest is build in a week to receive the  
22 transcripts, and then perhaps three weeks to write  
23 them?

24                  THE COURT: I'm sorry. Three weeks to  
25 what?

1                   MR. WALKINGSHAW: To write the briefs. So,  
2 perhaps, a month from now?

3                   MS. GORMAN: I guess I want to be clear,  
4 Your Honor, in terms of Professor -- I would have to  
5 contact the District of Oregon, but I would assume  
6 that Your Honor would want the complete testimony of  
7 Professor O'Brien because I know he only testified for  
8 a few minutes. And I don't know if that will change  
9 the timeline from the District of Oregon. So, I  
10 can check in with them too.

11                  But I guess in terms of post-hearing  
12 briefing, I want to know what areas this court would  
13 like us to brief, I guess.

14                  THE COURT: I'll tell you that it's the same  
15 area I've been struggling with, so I'll tell you what  
16 they are. And then Mr. Walkingshaw seems to think that  
17 he would want the opportunity to offer any additional  
18 arguments based on what's been presented so far and I'll  
19 let him do that.

20                  So, let me talk about timing. I'll talk  
21 about the page limit. And I'll tell you the issues.

22                  You want a 30-day deadline? I may not  
23 remember what I've heard already, so --

24                  MR. WALKINGSHAW: I'm open to other ideas,  
25 Your Honor. That seemed like it would be -- to review

1       the transcript and then put forth the argument, that  
2       seemed appropriate. But, I'm certainly open to if the  
3       Court has other ideas in mind, I don't mean to preclude  
4       the Court from suggesting an alternate schedule.

5                   THE COURT: All right. I'm going to give  
6       you until February 23rd to submit the post-hearing  
7       briefs. So, both hearing briefs will be due the same  
8       day.

9                   The issue that's important for me is still  
10      the issue of one of the questions I posed previously  
11      at the hearing before; and that is, whether or not  
12      the absence of any repudiation of the history that  
13      led to the adoption of the statute in 1929 should be  
14      construed as the defendant meeting his burden of  
15      demonstrating that the codification in 1952 was  
16      motivated by racial animus.

17                  So that's a broad question, but I think it's  
18      more nuance because I think it's important to focus on  
19      the difference between the 1930 -- the 1929 version of  
20      the statute, and the 1952 version of the statute. And  
21      you can argue it either way. If there was not much,  
22      as Ms. Gorman argued, there's not much changed to the  
23      statute, other than adding a remedy that's more  
24      punitive, then it would be easier for the defendant  
25      to argue that the lack of any rejection of the prior

1 history is indicia of racial animus; or, you can argue  
2 the opposite. So I see the parties, both sides, can  
3 argue either way.

4                   What I'm looking for is, I guess, case  
5 law that would support your position, and so far I  
6 haven't seen any case law that supports either position,  
7 unfortunately. So that's why it's still the same issue  
8 I've been struggling with from reading the initial set  
9 of briefs, even after the hearing, and through today.

10                  I don't know that you will be able to shed  
11 more light on that, but it's an issue I would like you  
12 to think about it in terms of the post-hearing brief  
13 that you wanted to submit.

14                  There may be one more. Let me look at my  
15 notes on the issues.

16                  Oh. And I reiterate that to the extent  
17 that the transcript of any of the experts who testified  
18 today, to the extent they have testified in other  
19 proceedings, I don't want the transcript just to be  
20 informed that they've testified. It will be only  
21 relevant if it's relevant for my purposes.

22                  MS. GORMAN: Your Honor, I would just ask,  
23 in terms of the District of Oregon transcript, since I  
24 presume it's regarding Professor O'Brien -- or Gonzalez  
25 O'Brien, that we have the complete transcripts. And I

1 just want to make sure that I can get those.

2 THE COURT: Well, if you're not able to get  
3 those, I don't want that to hold up my decision in this  
4 case. So the deadline is what it is already, which is  
5 February 23rd.

6 All right. Any other questions that you  
7 have before I conclude the hearing?

8 (No response.)

9 THE COURT: So to summarize, post-hearing  
10 briefs will be due on February 23rd -- oh, did I address  
11 the page limit?

12 THE CLERK: You didn't.

13 THE COURT: I did?

14 MR. WALKINGSHAW: No, Your Honor.

15 THE COURT: I haven't?

16 MR. WALKINGSHAW: I don't believe so, but  
17 I might have missed it. Peggy thinks you didn't.

18 THE COURT: I would like to say 10 pages per  
19 side as a limit because there's been exhaustive briefing  
20 already. I think 10 pages is fair. If you, uh -- but  
21 I'll accept comments if you think you need more than  
22 10 pages.

23 MR. WALKINGSHAW: Your Honor, I certainly  
24 appreciate that a lot of ink has been spilled on this  
25 case, not only the motion, the response, the reply,

1 the supplements. Uh, I can certainly try and keep it --  
2 I mean, and I'll let Ms. Gorman speak for herself -- I  
3 could certainly try to keep it at 10 pages. My only  
4 worry is that -- and I think the Court -- and I think  
5 everyone appreciates this. I mean, this is an important  
6 issue. I think -- you know, this is, uh -- and it's  
7 a complex issue. So, uh, I don't know. I would maybe  
8 ask for 12? But I don't want -- I don't want to overly  
9 negotiate the -- you know, and if Ms. Gorman thinks 10  
10 is fine, I can curve my voracity to the extent possible.

11 MS. GORMAN: Mess with the margins.

12 THE COURT: In a way, I kind of invited a  
13 debate -- or a request for more because I had said that  
14 I would be open to suggestions.

15 I'm going to give you up to 15 pages. I  
16 would say the parties' briefs were about 30 pages, and  
17 a lot of it relates to issues that I'm no longer  
18 concerned about. So, certainly, I think you could  
19 do it in five, if not 10 pages, but I'm going to give  
20 you up to 15.

21 MR. WALKINGSHAW: Okay.

22 THE COURT: That way, you're not reducing  
23 the margin or making the font so small that you're  
24 violating Local Rules and I can't read it.

25 All right. 15-page limit.

1                   MR. WALKINGSHAW: Actually, Your Honor, and  
2 since you bring it up, I just do have a brief question  
3 or just a point of clarification, if I could.

4                   So I am taking the presumption that the  
5 Court put on the record at the prior hearing, that the  
6 Court is inclined to employ the Arlington Heights  
7 framework. I'll certainly answer the question the  
8 Court asked. I just want to make sure that I'm being  
9 clear for the record that, you know, we've preserved  
10 our positions as to the stan -- I'm happy to answer  
11 the question. I think it's, uh -- you know, that's the  
12 brief I'm going to write. I just don't want to be  
13 construed as waiving any of our prior positions by  
14 addressing those issues, if that makes sense.

15                  And perhaps I'm being overly concerned here.  
16 But since we're moving to post-hearing briefing, I just  
17 want to make sure that those issues, you know, will be  
18 ruled on in some form or other, if that's -- I won't  
19 include the, you know, O'Brien, the deference stuff in  
20 the new brief. But, I just don't want to be construed  
21 as waiving any of that by leaving it out of the new  
22 brief, if that makes sense.

23                  THE COURT: You're inviting me to limit more  
24 pages here because the nature -- so let's be clear for  
25 the record. Whatever arguments that both sides have

1 already raised in the prior briefs, they're are deemed  
2 to be part of the record. I am not construing that you  
3 waive any of the arguments by not addressing them in the  
4 post-hearing briefs. I granted post-hearing briefs,  
5 primarily, because, Mr. Walkingshaw, you asked for it.  
6 And because you asked for it, I wanted you to have the  
7 full opportunity to brief the issue that I'm focusing  
8 on, that I just indicated.

9 If you want to, you can also focus on  
10 another issue that the government raised in the response  
11 that was briefly addressed in the reply; and that is,  
12 that whether if -- assuming that the defendant met his  
13 burden under Arlington Heights, the burden then shifts  
14 to the government, and the question whether the  
15 government met its burden.

16 So, you can briefly address that issue  
17 as well, if you want. But not addressing issues you  
18 have already addressed, will not be construed as you  
19 waiving, unless you specifically conceded an issue,  
20 which you did, with respect to the passage of the 1929  
21 statute.

22 MR. WALKINGSHAW: Thank you, Your Honor.  
23 I appreciate that. And I think that's entirely  
24 correct.

25 The COURT: All right.

1           Thank you everyone. I'm going to conclude  
2 the hearing then.

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4           (Court Adjourned.)  
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3 I certify that the foregoing is a correct  
4 transcript from the record of proceedings  
in the above-entitled matter.

5

\s\ Kathryn M. French

February 5, 2021

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KATHRYN M. FRENCH, RPR, CCR  
Official Reporter

DATE

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**I N D E X****3 DEFENDANT'S WITNESSES:** **PAGE:****4 1) KELLY LYTLE HERNANDEZ**

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